

# Horizontality and the “Spooky” Doctrines of American Law

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Whom does a constitution command?<sup>1</sup> Comparative constitutional analysis has revealed a wide divergence between the U.S. judicial system’s answer to this question and that of constitutional courts abroad. That the federal Constitution does not apply to private relations ranks among the most entrenched principles of American law.<sup>2</sup> Constitutional rights either apply because government action is involved or do not apply because private action is involved: with rare exceptions, common law doctrines of torts, contracts, and property are off the constitutional radar.<sup>3</sup> Although critics exist—four decades ago, Charles L. Black, Jr., famously called the state action doctrine “the most important problem in American law”<sup>4</sup>—more recent

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1. See generally LARRY ALEXANDER & PAUL HORTON, *WHOM DOES THE CONSTITUTION COMMAND?: A CONCEPTUAL ANALYSIS WITH PRACTICAL IMPLICATIONS* (1988) (discussing the scope of the U.S. Constitution’s legal reach).

2. The state action doctrine is different in some states. See Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 *STAN. L. REV.* 1521 (2010); Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, in *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS* 151 (James A. Gardner & Jim Rossi eds., 2010).

3. See Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 *MICH. L. REV.* 387, 388 (2003) (“[W]ith respect to its individual rights provisions, the Constitution binds only governmental actors and not private individuals.”).

4. Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14—The Supreme Court 1966 Term*, 81 *HARV. L. REV.* 69, 69 (1967).

commentary has urged that state action no longer be viewed as “the enemy” and instead recommends that “we . . . loosen the constitutional limits on certain kinds of government action without removing them entirely.”<sup>5</sup> By contrast, courts on the Continent and in the Commonwealth are moving in the opposite direction from U.S. developments, and appear to have reached a consensus that public rights do and should affect relations outside the public sphere.<sup>6</sup> Rather than accord strict boundaries to constitutional regulation, foreign courts instead favor a principle of horizontality<sup>7</sup>; public rights are understood as existing along a continuum,<sup>8</sup> and they exert a “radiating” effect on private activity depending on the relationships and interests involved.<sup>9</sup>

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5. David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT. 409, 409, 418 (1993); see also *Developments in the Law—State Action and the Public/Private Distinction: The Evolution of the State Action Doctrine and the Current Debate*, 123 HARV. L. REV. 1248, 1255 (2010) [hereinafter *Developments in the Law*] (referring to “the current division between formalist defenses and functionalist rejections of the doctrine”).

6. See Gert Brüggemeier et al., *Introduction to FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION: I. A COMPARATIVE OVERVIEW* 1 (Gert Brüggemeier et al. eds., 2010) (“In many European countries, it is now commonly acknowledged that fundamental rights (i.e. human rights, constitutionally protected rights and other rights considered as fundamental by the individual legal systems) do not only affect State-citizen relationships, but also relationships between private parties, at least in an indirect manner.”).

7. The term horizontality appears in U.S. constitutional doctrine, but to different effect. U.S. scholars use the language of verticality and horizontality to refer to the double dispersal of power in U.S. governmental relations, with vertical embracing federalism and the division of power between the national government and the states, and horizontal embracing nationalism and the division of power among the three co-equal branches of government; horizontal also denotes relations among the fifty states. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494 (2008) (“The Constitution allocates sovereign power between governments along two dimensions: a vertical plane that establishes a hierarchy and boundaries between federal and state authority, and a horizontal plane that attempts to coordinate fifty coequal states that must peaceably coexist.”).

8. See, e.g., Ulrich Preuß, *The German Drittwirkung Doctrine and Its Socio-Political Background*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 23 (András Sajó & Renáta Uitz eds., 2005) (“German courts and legal academia . . . shunned the either-or alternative and . . . essentially the concept of a comprehensive scope of the constitution has prevailed.”).

9. The term “radiating” effect appears in ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 389 (Julian Rivers trans., 2002).

On first consideration, “horizontal” and the accompanying idea of radiating effect might appear alien to U.S. legal thinking. For more than a century, the state action doctrine has allowed the most minimal space for raising the Constitution as a shield against “merely private conduct”;<sup>10</sup> the Court instead takes a binary approach that treats “[t]he wrongful act of an individual” as “simply a private wrong.”<sup>11</sup> Exacerbating the foreign flavor of developments abroad is the tendency of English-language discussions to use a German term—*Drittwirkung der Grundrecht*—when referring to the relaxation of state action requirements outside the U.S.<sup>12</sup> Moreover, many commentators associate the concept of radiating effect with the jurisprudence of Robert Alexy, a German legal philosopher whose writing about the Federal Constitutional Court of Germany made its English-language debut only at the turn of this century.<sup>13</sup> In addition, the relevance of judicial trends abroad to U.S. constitutional practice

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10. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

11. *The Civil Rights Cases*, 109 U.S. 3, 25-26 (1883); see Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 779 (2010) (stating that the “Court has never abandoned” the basic state action principle and the public/private divide that it embraces).

12. See, e.g., Eric Engle, *Third Party Effect of Fundamental Rights* (*Drittwirkung*), 5 HANSE L. REV. 165 (2009) (using the term *Drittwirkung* to refer to the third party effect of public rights in the private domain).

13. See, e.g., William Ewald, *The Conceptual Jurisprudence of the German Constitution*, 21 CONST. COMMENT. 591, 591 (2004) (reviewing ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002)) (reporting that the German-language version of Alexy’s book was published in 1986 and that it appeared in English translation in 2002). Alexy’s focus is that of the German Constitution. *Id.* at 594 (“His concern is thus limited to a single national constitution; he explicitly . . . disavows any intention . . . to provide a general theory of constitutional government, let alone a general theory of human rights.”). Commentators underscore that Alexy’s influence ranges beyond Germany. See, e.g., Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 574, 575 (2004) (reviewing ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002)) (referring to Alexy “as probably the leading contemporary legal philosopher on the Continent”). In his discussion of constitutional effect, Alexy underscores the widespread acceptance of the principle of horizontality: “The idea that constitutional rights norms affect the relations between citizens and in this sense have a third party or horizontal effect, is accepted on all sides today. What is controversial is how and to what extent they do this.” ALEXY, *supra* note 9, at 354-55 (footnote omitted).

inevitably is entangled with controversy over the applicability of foreign law to U.S. courts.<sup>14</sup> Muddying the water still further is the political valence of this topic: the rejection of foreign sources comes most strenuously from conservative legal commentators who express a desire to protect U.S. sovereignty.<sup>15</sup>

Certainly *Drittwirkung* sounds different from state action, as does its conclusion that constitutional rights may affect the relation between individuals and not simply the relation of individual to government. Moreover, although American law has embraced some exceptions to the state action doctrine, courts and commentators have tended to cabin the famous outliers of *Shelley v. Kraemer*<sup>16</sup> and *New York Times v. Sullivan*<sup>17</sup> to a model of government and not private action.<sup>18</sup> One might be tempted, therefore, to view

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14. See Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 374 (2009) (relating debates about the applicability of foreign law to American judicial decision making to the question of “American exceptionalism”).

15. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 3-4 (2008) (referring to the “critique by conservative commentators” of “Supreme Court opinions mentioning constitutional decisions by courts outside the United States”).

16. 334 U.S. 1 (1948).

17. 376 U.S. 254 (1964).

18. See Renáta Uitz, *Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now?—An Introduction*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM*, *supra* note 8, at 1, 8 (explaining that common law rules become subject to constitutional review by attributing “the activities of courts in a civil lawsuit between private parties to the government”). Of course, some have argued that government action is involved in every dispute concerning only private individuals given the foundational role of law in creating and sustaining private relations. See, e.g., Black, *supra* note 4, at 70 (focusing on the presence of state action “in all the cases that come to court”); Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957) (“[W]henever, and however, a state gives legal consequences to transactions between private persons there is ‘state action.’”). *But cf.* Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 367 (1993) (stating that although “the claim of interpenetration of the private by the public in the legal realm is correct[,] . . . absolutely nothing follows from the claim as a matter of constitutional or moral imperative”).

the principle of horizontality as alien to American legal analysis and to reject out of hand its interpretive methodology of ascribing radiating effect to constitutional rights. A handful of scholars have resisted this tendency, largely focusing on whether a doctrinal gap in fact exists between American and foreign constitutional law and then attempting either to explain the inconsistency or to effect a reconciliation.<sup>19</sup> In a similar spirit, this Article explores whether a *methodological* gap in fact exists between the interpretive approach of U.S. courts and courts abroad in constitutional cases: I examine whether American law possesses analytic tools, internal to U.S. constitutional practice, that might support rearranging the state action doctrine along the lines of horizontality. Finding some methodological convergence, I suggest that *Drittwirkung* as an interpretive approach shares more in common with American constitutional law than first meets the eye.<sup>20</sup>

The topic is important for a number of reasons. Forty years after Charles L. Black, Jr., wrote his foreword to the *Harvard Law Review*, asking, “[s]tate action again?”<sup>21</sup> commentators once more are focused on ways to hold private actors accountable for conduct that threatens public values.<sup>22</sup> Here at home, the increasing privatization of American democracy—what Paul R. Verkuil has called

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19. Stephen Gardbaum, in particular, has argued that a principle of horizontality is located in the Supremacy Clause, which he reads to eliminate entirely a “separate threshold issue of state action.” Gardbaum, *supra* note 3, at 391; see also Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, in EUROPEAN AND US CONSTITUTIONALISM: SCIENCE AND TECHNIQUE OF DEMOCRACY 131, 143 (Georg Nolte ed., 2005) (attempting to explain “the doctrinal disparity” between the Strasbourg Court and the U.S. Supreme Court regarding state action).

20. Cf. Jeffrey B. Hall, *Taking “Rechts” Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany*, 9 GERMAN L.J. 771, 772 (2008) (discussing similarities between the “analytical method” of Ronald Dworkin’s moral philosophy and the constitutional methodology of the Federal Constitutional Court of Germany); Ewald, *supra* note 13, at 592 (observing that even when judicial decisions of different courts “converge on the same result, the process of reasoning is often different enough to be theoretically illuminating”).

21. Black, *supra* note 4, at 69.

22. See, e.g., Uitz, *supra* note 18, at 1, 3 (suggesting that questions about the horizontal effect of constitutional rights once again are in “the lime-light”).

“outsourcing sovereignty”<sup>23</sup>—has exerted particular pressure on the state action doctrine, which looks exclusively to government action as a predicate for constitutional enforcement.<sup>24</sup> At the same time, commentators are expressing mounting anxiety that private economic power, and particularly corporate power, will undermine democratic norms unless the Court develops new doctrines to protect public values against private invasion.<sup>25</sup> In addition, the Court’s approach to the state action doctrine affects Congress’s power to enact protective legislation under Section 5 of the Fourteenth Amendment against private forms of discrimination.<sup>26</sup> As Dean Erwin Chemerinsky emphasized a generation ago, “[t]he state action requirement is undesirable because it requires courts to refrain from applying constitutional values to private disputes even though there is no other form of effective redress.”<sup>27</sup>

The foreign practice of horizontality responds to concerns of this sort by recognizing the effect of constitutional rights in the private sphere, even in areas in which the state has no duty to protect against private

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23. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007); see also Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 965 (2005) (discussing the urgency of finding alternatives to due process “in the era of privatization”). See generally GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Mino eds., 2009) (discussing the relation of outsourcing to democratic values).

24. See, e.g., Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1171 (1995) (asking whether it is “important to guarantee constitutional standards in the operation of privatized enterprises”).

25. See, e.g., Noah Feldman, *What a Liberal Court Should Be*, N.Y. TIMES, June 27, 2010, (Magazine), at 43 (raising concerns about the “threat of control [of the U.S. democratic system] by market actors” and calling for a new form of progressive constitutionalism).

26. See Terri Peretti, *Constructing the State Action Doctrine*, 35 LAW & SOC. INQUIRY 273, 274 (2010) (explaining that the state action doctrine affects the scope of legislative power to enact civil rights laws).

27. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985); cf. Jack M. Beerman, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 34 (2004) (“[W]hen constitutional values are threatened by private actors, they ought to be subject to the same constraints as public actors.”).

activity that impinges on public norms.<sup>28</sup> Comparative constitutional analysis could offer an important opportunity for a better understanding of the state action requirement, for viewing it from a new perspective, and for considering whether reform is warranted.<sup>29</sup> Of course, the literature on legal transplants urges caution before embracing doctrinal approaches that appear successful abroad.<sup>30</sup> Paradoxically, a comparative inquiry of the state action doctrine could draw attention to underappreciated ideas that are internal to American law that might help to promote greater accountability of private actors through methods that are indigenous to U.S. constitutional practice.

The Article proceeds as follows. Part I frames the argument by briefly discussing *Drittwirkung* and the idea of radiating effect with which it is associated. In this Part, I sketch out a conflict between interpretive practice abroad and the dichotomous approach that typifies the Supreme Court's state action jurisprudence. Part II explores whether the gap between *Drittwirkung* and American constitutional methodology is more apparent than real—or, at the least, whether it is based on incomplete assumptions about American constitutional methodology. The principle of *Drittwirkung* assumes that rights instantiate values and

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28. The judicial extension of constitutional rights into the private sphere is only one of a number of legal strategies aimed at holding private power accountable to public norms. See, e.g., Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. (forthcoming 2011) (characterizing the commercial practice of embedding terms in standard form agreements that control court procedure as a form of privatization and suggesting nonconstitutional forms of regulation); Guy Mundlak, *Human Rights and the Employment Relationship: A Look Through the Prism of Juridification*, in HUMAN RIGHTS IN PRIVATE LAW 297, 328 (Daniel Friedmann & Daphne Barak-Erez eds., 2001) (referring to the extension of human rights into private workplace relations as “a limited response that must be complemented by other forms of reflexive regulation”).

29. See generally Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1040 (1999) (explaining that comparative legal analysis can “provide greater guidance, stronger justifications, or an increase in accountability”).

30. See, e.g., Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002) (cautioning that the transplanting of foreign procedures into a domestic legal system may produce “broader cultural changes—for good or ill”).

that these values may be effectuated by courts and political actors beyond their immediate text, primary purpose, or principal domain. This Part examines a host of approaches that are pervasive throughout federal constitutional doctrine—including “penumbral” thinking and structural interpretation—and explores whether they resemble in any relevant way the analytic methods that courts abroad use to enforce public rights in the horizontal position. Admittedly, some of these approaches are disparaged in the academic literature as “scary,” “spooky,” and located in the “twilight zone.”<sup>31</sup> Nevertheless, American commentators on both sides of the political spectrum comfortably employ these devices when interpreting both the individual rights and the structural provisions of the Constitution.<sup>32</sup>

Part III examines these “spooky” American approaches from the perspective of horizontality, exploring whether they provide interpretive devices internal to U.S. law that could support rearranging the state action doctrine in ways that approximate the foreign practice of *Drittwirkung*. I argue that what marks each of these interpretive approaches and makes them similar in the relevant sense to constitutional practice abroad is the extent to which they facilitate the migration of constitutional rights, understood as principles or values, from one sphere to another sphere that is regarded as conceptually separate and distinct. To the extent that the state action doctrine defines the

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31. Charles A. Kelbley, *The Impenetrable Constitution and Status Quo Morality*, 70 *FORDHAM L. REV.* 257, 261 (2001) (using Professor Laurence H. Tribe’s statement that the penumbra metaphor is “twilight zone talk” (quoting 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 43 (3d ed. 2000))). *But see* James E. Fleming, *Securing Deliberative Autonomy*, 48 *STAN. L. REV.* 1, 38 n.215 (1995) (“I do not concede that there is anything spooky or scary about penumbras and emanations . . .”).

32. With respect to individual rights, typically associated with liberal jurisprudence, see Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 *HARV. L. REV.* 110, 170-72 (1999) (discussing structural inferences and penumbral reasoning in the area of individual rights). With respect to structural provisions, typically associated with conservative jurisprudence, see Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 *U. PA. L. REV.* 1333, 1336-37 (1992) (“[P]enumbral reasoning . . . is used regularly by judges generally regarded as conservative.”). *See also* Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 *B.U. L. REV.* 1089, 1090 (1997) (“[C]onservatives on the Court have embraced . . . ‘penumbral reasoning’ . . .”).

boundary between the public and private spheres, the practices that I identify may create an interpretive pathway through which public norms can be resettled outside their conventional domain and so work to influence the shape and content of private relations. This Part further argues that exceptions to the American state action doctrine that the Court already has recognized may be explained by a principle of indirect constitutional effect. The final section of this Part answers a likely objection to relaxing the state action doctrine. Commentators who support retaining a rigid state action doctrine, or at least justify the American system's continued attachment to the requirement, point to the importance of sustaining a private sphere in which individuals can live and flourish free from government oversight and regulation.<sup>33</sup> Like the practice of horizontality, the approaches that I have identified can be used to secure the greater accountability of powerful private actors while nevertheless sustaining and protecting those private spaces that seem essential to democratic life. The Article concludes with some thoughts about American exceptionalism and the comparative constitutional method.

#### I. *DRITTWIRKUNG* AND THE IDEA OF RADIATING EFFECT

Even on its own terms, *Drittwirkung* presents a complex idea of a scope and dimension not always easy to describe.<sup>34</sup> Like the state action doctrine with which it is functionally associated, *Drittwirkung* implicates important background assumptions about individualism, collective goods, racial and ethnic identity, federal organization, and the relation between the public world of politics and the private world of markets and social relations.<sup>35</sup> Comparative

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33. See Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 401 (1993) (explaining that the state action doctrine reflects a desire "to embrace the concept of a private sphere because we know that it preserves a space for individual flourishing that the state might otherwise destroy").

34. See P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 22 (A.W. Heringa et al. eds., 4th ed. 2006) ("*Drittwirkung* is a complicated phenomenon about which there are widely divergent views.").

35. Cf. Stanley I. Benn & Gerald F. Gaus, *The Public and the Private: Concepts and Action*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 5 (Stanley I. Benn &

constitutional analysis thus requires attention not only to sensitive linguistic translation, but also to broader questions of constitutional, political, and social culture.<sup>36</sup> This Part sketches out those features of *Drittwirkung* that are critical to the argument that follows.

#### A. *Horizontality and State Action Abroad*

Foreign discourse uses a spatial terminology—that of verticality and horizontality—when referring to the enforceability of public rights against particular legal actors. “Vertical” refers to the application of such rights in the relations of an individual to government; “horizontal” refers to the application of such rights to the relations of an individual to another individual, and thus in situations where state action by convention is absent.<sup>37</sup> The principle of horizontality embraces a secondary distinction: the direct effect of a public right on private relations, and the indirect effect of such a right. Within the categories of direct and indirect effect, courts and commentators deploy a number of different terms, reflecting national variation, conceptual nuance, and practical divergence. For example, Portuguese scholars use the term *efeito directo* and *efeito horizontal*, while Italian scholars use the term *effetti orizzontali*, often combined with the idea of effectiveness *erga omnes*.<sup>38</sup> The German term *Drittwirkung* often appears as an omnibus expression in part reflecting the critical work of the German

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Gerald F. Gaus eds., 1983) (treating the public/private distinction as a “*complex-structured concept*”).

36. TUSHNET, *supra* note 15, at 4-5 (“[D]ifferences in constitutional cultures complicate the task of doing comparative constitutional law . . .”). Similar difficulties confound comparative analysis of private law. *See, e.g.*, Hugh Collins, *Good Faith in European Contract Law*, 14 OXFORD J. LEGAL STUD. 229, 254 (1994) (discussing the relation between “cultural diversity” and the private law doctrine of contractual good faith).

37. Aharon Barak, *Constitutional Human Rights and Private Law*, in HUMAN RIGHTS IN PRIVATE LAW, *supra* note 28, at 13, 13 (explaining that rights “operate vertically when applying between the State and the individual and horizontally when applying between private persons”).

38. *See* Giovanni Comandé, *Comparative Remarks*, in FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION: I. A COMPARATIVE OVERVIEW, *supra* note 6, at 698, 716-22; *see also* Uitz, *supra* note 18, at 9 (referring to “terminological difficulties . . . [in] naming an abstract phenomenon that is traceable in the jurisprudence of many courts”).

courts in recognizing the principle and in articulating a coherent jurisprudence.<sup>39</sup>

### B. *Radiating Effect and Foreign Judicial Methodology*

The theory of horizontality “attempt[s] to justify the contention that basic rights bind individuals to greater or lesser degrees,”<sup>40</sup> and are not limited in effect to the relations of individuals with government. The literature about horizontality conceptualizes public rights in two somewhat different ways. In the first, public rights display a migratory capacity that allows them to wield power outside their primary domain of government activity; as such, even though constitutional rights are denominated as public rights, they nevertheless exert interpretive force in the private sphere of social relations and market transactions. Public rights thus are assumed to influence the content of legal relations even where state action in the American sense is not implicated; their legal effect extends to issues that arise not only between an individual and the government, but also between private individuals. Where the principle of direct effect applies, an individual may enforce a public right against another individual on the view that a private activity has infringed upon a right that runs directly between the two individuals. To borrow a frequently invoked example: “[I]f A shouts and disturbs a meeting, he infringes the constitutional human rights of B, a fellow participant, to associate freely and will be held liable to him.”<sup>41</sup> Where the principle of indirect effect applies, an individual may not enforce a public right against another individual, but derives the benefit of the right indirectly through private law doctrines that are interpreted in light of the public norm. Again, an often recited example states: “[I]f A refuses to sell his products to

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39. Comandé, *supra* note 38, at 701 (referring to “relationships among citizens themselves (so-called horizontal effect or third party effect, ‘Drittwirkung’)”); see also Matej Avbelj, *Is There Drittwirkung in EU Law?*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM*, *supra* note 8, at 145, 146 (stating that the German Federal Constitutional Court “first developed” the concept of *Drittwirkung*).

40. Christian Starck, *Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court*, in *HUMAN RIGHTS IN PRIVATE LAW*, *supra* note 28, at 97, 97.

41. Barak, *supra* note 37, at 14.

C, a woman, he is likely to be liable to her for lack of good faith in conducting the negotiations.”<sup>42</sup> An important question concerning indirect effect asks whether a court must create new private law mechanisms through which to incorporate a public norm where existing doctrine fails to provide a pathway for indirect enforcement.<sup>43</sup>

Horizontality also embraces a second, and somewhat different, conception of public rights that is based on a contrasting structural understanding of a constitution and its relation to public law and to private law. In this second sense, rights are conceived as objective values that form the foundation both for public law and private law. On this conception, constitutional rights do not radiate from the public sphere to the private sphere. Rather, public law and private law are “united in a single edifice,” and rest on constitutional values that provide the foundation stone for both the public and private domains.<sup>44</sup> In this latter version, public norms are said to radiate up from the ground to public law and private law, rather than across from public law to private law.

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42. *Id.* at 21.

43. *See, e.g.*, Johan Van Der Walt, *Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga*, 19 SAJHR 517, 520 (2003) (discussing the effect of an “outdated conceptualism regarding the formal or procedural actionability of a case in law” on the proper functioning of horizontality). Alexy uses the term *Drittwirkung* to refer to “a single phenomenon of horizontality”: whether rights are understood to exert direct or indirect effect on private relations leads in his view to the same protection of objective values in cases involving private law. *See* Julian Rivers, *Introduction to ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS*, at xxxvi-xxxvii (Julian Rivers trans., 2002).

44. Hugh Collins, *The Constitutionalization of European Private Law as a Path to Social Justice?*, in *THE MANY CONCEPTS OF SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW* (Hans W. Micklitz, ed., forthcoming Oct. 31, 2011) (manuscript at 3) (on file with author); *see also* E-mail from Hugh Collins, Professor of English Law, London School of Economics, to author (Oct. 5, 2010, 5:40 AM) (on file with author) (emphasizing the different structural conception of a legal system that supports the two versions of horizontality). For a similar exposition, see Matthias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341, 343-45 (2006), explaining an idea of a total constitution that “serves as a guide and imposes substantive constraints on the resolution of any and every political question . . . including those concerning the relationships between individuals governed by private law.”

The most sustained exposition of horizontality appears in Robert Alexy's *A Theory of Constitutional Rights*, based on a "reconstructive account" of the decisions of the Federal Constitutional Court of Germany.<sup>45</sup> Alexy builds architectonically from the assumption that a constitution reflects an attempt "simultaneously to organize collective action and secure individual rights."<sup>46</sup> Within a constitution, rights are norm-like principles that stand for optimization requirements, in the sense of their requiring "that something be realized to the greatest extent possible given their legal and factual possibilities."<sup>47</sup> Principles share the same "conceptual structure" as values;<sup>48</sup> they lack "fixed points in the field of the factually and legally possible"<sup>49</sup> and instead reflect "what prima facie ought to be."<sup>50</sup> This conceptualization of rights as optimization requirements alters thoroughly the court's interpretive practice relative to U.S. law. American constitutionalists often are assumed to treat rights as rules pertaining to individual entitlements that are to be enforced in a binary fashion as "trumps."<sup>51</sup> Whereas a rule is interpreted and applied to require "that exactly what it demands to be done," conceiving rights as principles requires the court to use a proportionality analysis that weighs and balances the different values that are at play; the goal is to determine "the appropriate degree of satisfaction of one principle relative to the requirements of another principle."<sup>52</sup>

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45. Kumm, *supra* note 13, at 575; *see also* Ewald, *supra* note 13, at 594 (stating that Alexy attempts "a comprehensive, rational reconstruction of the constitutional law of human rights as it has been articulated in the decisions of the German Constitutional Court").

46. ALEXY, *supra* note 9, at 425.

47. *Id.* at 47; *see* Kumm, *supra* note 13, at 576-77 (discussing Alexy's theory).

48. ALEXY, *supra* note 9, at 93.

49. Kumm, *supra* note 13, at 578.

50. ALEXY, *supra* note 9, at 92.

51. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1978). *Compare* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 725 (1998) (criticizing the idea of trumps), *with* Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 301 (2000) (criticizing Pildes's argument).

52. Robert Alexy, *The Construction of Constitutional Rights*, 4 LAW & ETHICS HUM. RTS. 20, 21-22 (2010); *cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 139

The characterization of constitutional rights as values and the use of proportionality analysis provide the foundation for the interpretive practice of ascribing “radiating” effects to rights. The radiation thesis uses the language of spheres to express a “scope for action” and the “realm of the possible,” but it refuses to cabin public rights within a sphere denominated as public.<sup>53</sup> Instead, “constitutional rights norms” exert a significant interpretive effect on the legal system as a whole, and this system includes “the norms of private law,” which pertain to “relations between citizens.”<sup>54</sup> As explained in the frequently quoted *Lüth* decision of the Federal Constitutional Court of Germany, basic rights not only “are defensive rights of the individual against the state,” but also “establish[] an objective order of values,” and “[t]his value system . . . must be looked upon as a fundamental constitutional decision affecting all spheres of law . . . . It serves as a yardstick for

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(William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“The most precise form of authoritative general direction may conveniently be called a rule[,] . . . defined as a legal direction which requires for its application nothing more than . . . determinations of fact.”); see also Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 *IND. J. GLOBAL LEGAL STUD.* 483, 503-06 (2009) (discussing balancing within a theory of constitutional value). *But see* Alexy, *supra*, at 23 (“If the principles construction is defined as a proportionality construction that includes balancing essentially, then this, too, is a rule construction, albeit one of a special kind.”).

53. ALEXY, *supra* note 9, at 177 (internal quotation marks omitted).

54. *Id.* at 351-52. Alexy offers this elaboration in his Postscript to the English-language translation of his book:

The role of constitutional rights in the legal system changes fundamentally. While classic constitutional rights were limited to one part of the legal system, the relationship between state and citizen, constitutional rights as principles would have an effect throughout the entire system. There would be a radiating effect in all fields of law, which would necessarily lead to the third party, or horizontal, effect of constitutional rights, as well as to constitutional objects such as protection, social security, organization, and procedure, which require a positive act on the part of the state and are not limited to requiring state omissions, as are the classic liberties. In this way, constitutional rights would become the “highest principles of the entire legal system.”

*Id.* at 389 (footnote omitted).

measuring and assessing all actions in the areas of legislation, public administration, and adjudication.”<sup>55</sup>

Alexy emphasizes that the significant question is not whether values derived from the constitution “radiate into all areas of the legal system,” but rather “in what form the influence takes place and what its content is.”<sup>56</sup> That guidelines exist suggests that the constitution provides a “substantively determined character” to the legal system, but the system nevertheless is open because the character of constitutional norms, entailing principles or values that embrace optimization requirements, “implies the necessity of balancing interests.”<sup>57</sup> Finally, Alexy relates the openness of the legal system to questions of justice, maintaining that the system is open “*in respect of morality*.”<sup>58</sup> It follows that unlike a system in which constitutional rights are characterized as rules, one cannot assume that there is only “one answer to the question whether the court has exceeded its jurisdiction whenever it takes some form of action against the legislature.”<sup>59</sup>

### C. *Spatial Metaphor and Comparative Constitutional Analysis*

The American state action doctrine shares with horizontality the use of a spatial metaphor that interrogates the “reach” of constitutional rights.<sup>60</sup> Despite the rhetorical

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55. An English translation of the decision appears in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 361, 362-63 (2d ed. 1997); see also Kumm, *supra* note 44, at 350 (“[T]he Court held for the first time . . . that ‘constitutional rights are not just defensive rights of the individual against the state, but embody an objective order of values, which applies to all areas of the law . . . and which provides guidelines and impulses for the legislature, administration and judiciary.’”) (first and second alterations added); Alec Stone Sweet, *The Juridical Coup d’État and the Problem of Authority*, 8 GERMAN L.J. 915, 919 (2007) (positing that the decision in *Lüth* “constitutes . . . the single most important constitutional change in the history of [the German legal system]”).

56. ALEXY, *supra* note 9, at 354.

57. *Id.* at 365-66.

58. *Id.* at 366.

59. *Id.* at 367.

60. See Jacco Bomhoff, *The Reach of Rights: “The Foreign” and “The Private” in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign*

similarity, a significant gap exists between the American and foreign practice. In the American setting, the spatial metaphor carries a hard edge that separates the public world of the state from the private world of markets and social relations.<sup>61</sup> Absent from the U.S. doctrine is a sense that a constitution can be enforced in a continuous, rather than a dichotomous, way, or that public norms may affect private relations indirectly in cases where the government has no duty to protect against individual action. The American legal system's continuing allegiance to this version of the public/private divide often is seen as a basic, if peculiar, feature of U.S. constitutional law.<sup>62</sup> Like the constitutional border that polices the division between church and state, the state action doctrine erects a barrier between the public and the private that is "high and impregnable,"<sup>63</sup> and would appear to block the possibility of public rights radiating across borders.<sup>64</sup>

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*Elements*, 71 LAW & CONTEMP. PROBS. 39, 41-42 (2008) (positing that the state action doctrine and horizontality "rely heavily on the spatial metaphor of the reach of fundamental rights"); see also Burr Henly, "Penumbra": *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 82 (1987) (explaining that spatial metaphors allow judges to describe legal ideas "as if they existed in two- or even three-dimensional form").

61. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."). See generally Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1205 (1985) ("The spatial metaphor was reflected at each level of legal consciousness as it was a deeply engrained convention about the proper way to re-present social relations.").

62. See Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1007 (1987) (observing that the Court "continues to bound separate public and private spheres").

63. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). But see Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 138 ("Since 1990, the Supreme Court's religious liberty jurisprudence . . . has given way to a jurisprudence emphatically centered upon equality, [rather than upon separation].").

64. The language of borders also appears in Justice Scalia's description of separation of powers. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (calling separation of powers "a distinctively American political doctrine" and one that "profits from the advice authored by a distinctively American poet: Good fences make good neighbors").

It is precisely this linear, two-dimensional quality of the state action doctrine—its binary, dichotomous focus—that has elicited so much critical commentary.<sup>65</sup> Laurence H. Tribe notably chastised the Court for adopting an approach to constitutional enforcement that he likened to a “Newtonian conception” of state power that sees law as separate and distinct from the world of the social.<sup>66</sup> Tribe wrote: “Newton’s conception of space as empty, unstructured background parallels the legal paradigm in which state power, including judicial power, stands apart from the neutral, ‘natural’ order of things.”<sup>67</sup> Tribe invited courts and legal commentators to enter the “curvature of constitutional space”—a term drawn from Einstein’s theory of relativity—and to recognize that “the law cannot extract itself from social structures,” but rather “is inevitably embroiled in the dialectical process whereby society is constantly recreating itself.”<sup>68</sup> To underscore the usefulness of the “curved space metaphor,” Tribe pointed to the Court’s *DeShaney* decision, where the requirement of state action was found to bar constitutional relief for a child who was beaten by his father into a permanent profoundly retarded condition even as social workers and other state officials persisted in allowing the parent’s custodial relation to continue.<sup>69</sup> In Tribe’s view, the fixed boundary erected by

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65. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1431 (2003) (calling state action an “all or nothing” requirement). Charles L. Black, Jr., graphically described the state action doctrine as serving to “imprison[ ] black children” in schools that were “separate but equal,” as it “also cut off all black people, children and grown-ups, from any kind of equal participation in the common life of the community. The ‘state action’ doctrine sealed all the cracks in the wall.” Charles L. Black, Jr., “*And Our Posterity*,” 102 YALE L.J. 1527, 1530 (1993).

66. Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989). Compare David L. Shapiro, *The Death of the Up-Down Distinction*, 36 STAN. L. REV. 465 (1984) (offering a parody of critical spatial description), with Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1142-46 (1989) (discussing the cognitive significance of “Up-down and other Image-Schemata”).

67. Tribe, *supra* note 66, at 7.

68. *Id.* at 7-8.

69. See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989). I appeared as amicus curiae in this case as an attorney with the American Civil Liberties Union on behalf of petitioner urging reversal.

the state action doctrine impermissibly limited constitutional protection in that case only to situations “when another arm of the state has reached out and shattered [a] natural, pre-political order by itself directly harming” an individual.<sup>70</sup>

Horizontality, with its talk of radiating effect, invites us to enter “the curvature of constitutional space,” in the sense of a legal system that recognizes the conceptual separation of the private from the public, yet treats both domains as empowered and constrained by constitutional norms.<sup>71</sup> The right to free speech, for example, which an individual may claim against the government, would affect an individual’s relations with other nongovernmental actors, although not in the same way and to the same extent were the government involved.<sup>72</sup> By viewing constitutional rights as continuous rather than as dichotomous, the principle of horizontality thus assumes that public norms are capable of influencing private relations in ways that are dynamic, purposeful, and democratically significant.<sup>73</sup>

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70. Tribe, *supra* note 66, at 10.

71. See Tribe, *supra* note 66, at 25 (urging a constitutional discourse that attends to “the *geometry* of the state’s common law” and treats the “state not as a thing but as a set of rules, principles, and conceptions that interact with a background which is in part a product of prior political actions”).

72. See Oliver Gerstenberg, *What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law*, 17 CAN. J.L. & JURISPRUDENCE 61, 70 (2004) (explaining that the scope and content of a public right exerting effect in the private sphere “can’t be fixed in a merely conceptual or descriptive way (as, say, part of a neutral and disengaged first-order discourse), but can only be the *outcome* of a normative interpretive judgement [sic]”). Alexy’s translator, drawing a comparison between horizontality and the common law approach, invites attention to what he calls A.W.B. Simpson’s “memorable metaphor”: “the point about the common law is not that everything is always in the melting-pot, but that you never quite know what will go in next.” Rivers, *supra* note 43, at 1-1i (quoting A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS ON JURISPRUDENCE (2D SERIES) 77, 91 (A.W.B. Simpson ed., 1973)).

73. Cf. Dieter Grimm, *The Protective Function of the State*, in EUROPEAN AND US CONSTITUTIONALISM: SCIENCE AND TECHNIQUE OF DEMOCRACY, *supra* note 19, at 119, 120 (discussing the protective role of the state as including judicial power “to declare a law null and void when the legislature went too far in limiting a fundamental right, but also when it did too little in order to protect a fundamental right against injury by private actors”).

## II. RADIATING EFFECTS, AMERICAN STYLE

*Drittwirkung*—recognizing the effect of public rights on private actors in the private sphere—differs from the American requirement of state action by extending the reach of constitutional norms beyond government actors.<sup>74</sup> Moreover, its interpretive approach of ascribing radiating effects to constitutional rights—whether from the public sphere into the private sphere or from the foundation up to the public and private spheres—may seem far afield from analytic methods conventionally used in American constitutional practice. While courts abroad facilitate the interpenetration of public rights in private relations, here Supreme Court Justices emphasize the importance of policing “high walls” between the public and the private to maintain sound constitutional practice.<sup>75</sup> This Part urges that we not confuse a portion of American constitutional practice with its whole.<sup>76</sup> At the level of constitutional methodology, horizontality shares more in common with American judicial practice than typically is appreciated: in important areas, American constitutional enforcement turns—as with horizontality—“not upon absolute

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74. The U.S. state action doctrine conceptually involves two issues that often are intertwined: one is the reach of constitutional rights into private relationships, and the other is the reach of federal constitutional law into state power. An analogue of the latter issue largely is absent in the European context. See Mattias Kumm & Victor Ferreres Comella, *What Is So Special About Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM*, *supra* note 8, at 241, 271 (attributing individual autonomy and federalism justifications to the U.S. state action doctrine).

75. *But see* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 245 (1995) (Breyer, J., concurring) (“[O]ne might consider as well that poet’s caution, for he not only notes that ‘Something there is that doesn’t love a wall,’ but also writes, ‘Before I built a wall I’d ask to know/ What I was walling in or walling out.’” (quoting Robert Frost, *Mending Wall*, in *THE NEW OXFORD BOOK OF AMERICAN VERSE* 395, 395 (Richard Ellmann ed. 1976))). See generally Stephen J. Safranek, *Can Science Guide Legal Argumentation? The Role of Metaphor in Constitutional Cases*, 25 *LOY. U. CHI. L.J.* 357, 371-98 (1994) (discussing the “wall” metaphor).

76. *Cf.* Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 *CHI.-KENT L. REV.* 239, 262 (1988) (“There is no methodological generalization that holds over the run of our constitutional jurisprudence, of course . . .”).

distinctions, but upon degree,”<sup>77</sup> with the Court ascribing significant indirect effects to public rights outside their principal sphere, beyond their immediate text, or far afield from their primary purpose. This Part discusses three main examples.

A. *Emanations and Spheres of Privacy: First Amendment Penumbras and Incorporation by Absorption*

Talk of radiating effect inevitably resonates with the idea of “penumbras, formed by emanations,” discussed in *Griswold v. Connecticut*,<sup>78</sup> where the Court invalidated a Connecticut statute that prohibited the use of contraceptives even by a married couple inside the bedroom of their home.<sup>79</sup> The Constitution mentions neither marriage nor privacy, but Justice William O. Douglas’s majority opinion recognized a right to marital privacy—a “peripheral right[]” that “is not expressly included in the First Amendment” but the existence of which “is necessary in making the express guarantees fully meaningful.”<sup>80</sup>

Justice Douglas’s talk of penumbras and emanations is famous for having elicited derisive criticism.<sup>81</sup> Yet the Court’s use of these metaphors did not originate in *Griswold*. “Emanation” in Supreme Court parlance traces at least as far back as Chief Justice Marshall’s opinion in *McCulloch v. Maryland*,<sup>82</sup> and later to Thomas Cooley’s discussion of implied federal powers in his important

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77. *Plaut*, 514 U.S. at 245 (Breyer, J., concurring).

78. 381 U.S. 479, 484 (1965).

79. *Id.* at 485-86.

80. *Id.* at 483.

81. See Dorothy J. Glancy, *Douglas’s Right of Privacy: A Response to His Critics*, in “HE SHALL NOT PASS THIS WAY AGAIN”: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 155, 160-61 (Stephen L. Wasby ed., 1990) (quoting conservative jurists’ reactions to Douglas’s penumbra analysis). *But see* Kelbley, *supra* note 31, at 259 (stating that “it would be more accurate to say that Douglas was simply relying in great part on common sense” and not on metaphysics).

82. 17 U.S. (4 Wheat.) 316, 404-05 (1819) (“The government of the Union . . . emanates from [the people]. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”).

treatise.<sup>83</sup> As to penumbra, Oliver Wendell Holmes, Jr., initially used the term to denote uncertainty or discretion,<sup>84</sup> although in later decisions the metaphor came to stand for a different idea: the enforcement of norms peripheral to an enumerated right or textual provision that is critical to secure enforcement of the core.<sup>85</sup> Thus, for example, in *Schlesinger v. Wisconsin*,<sup>86</sup> Justice Holmes observed in dissent that “the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured.”<sup>87</sup>

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83. See THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 105-07 (3d ed. 1898) (discussing the existence and importance of “incidental powers”).

84. See *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring) (“If this view be adopted we get rid of all questions of penumbra, of shadowy marches where it is difficult to decide whether the business extends to them.”); Ronald R. Garet, *Gnostic Due Process*, 7 *YALE J.L. & HUMAN.* 97, 114 n.51 (1995) (referring to *Hanover Milling* as the “earliest” Supreme Court case using the penumbra metaphor). Benjamin H. Cardozo used the metaphor of penumbra in New York appellate decisions to mean uncertainty or discretion. See *Norwegian Evangelical Free Church v. Milhauser*, 169 N.E. 134, 135 (N.Y. 1929) (Cardozo, C.J.) (“There is in all such controversies a penumbra where rigid formulas must fail.”). He used the metaphor to similar effect in Supreme Court opinions, as well. See, e.g., *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (Cardozo, J.) (explaining that Congress’s spending power has “a middle ground or certainly a penumbra in which discretion is large”). Justice Douglas likewise used the penumbra metaphor to refer to uncertainty, in *General Box Co. v. United States*, 351 U.S. 159, 169 (1956) (Douglas, J., dissenting) (“The problem lies in the penumbra of Louisiana law, making all the more difficult a prediction as to what the Louisiana courts would hold.”); see also *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 457 (1957) (“Other problems will lie in the penumbra of express statutory mandates.”).

85. See Kelbley, *supra* note 31, at 259 (discussing the Holmesian penumbra metaphor); see also Henly, *supra* note 60, at 83-84 (discussing evolution of the Holmesian penumbra metaphor (citing O.W. Holmes, Jr., *The Theory of Torts*, 7 *AM. L. REV.* 652, 654 (1873), reprinted in 44 *HARV. L. REV.* 773, 775 (1931))).

86. 270 U.S. 230 (1926).

87. *Id.* at 241 (Holmes, J., dissenting). Karl Llewellyn used the word penumbra in a somewhat different sense. For Llewellyn, a practice could enter into “the penumbra of the working Constitution,” which he viewed as a “sort of limbo,” including:

[A] matter on which there are few precedents, or no precedents, but the handling of which is measurably predictable, should it occur; or of a matter on the relative importance of which skilled observers might differ; or of a practice under which a seemingly growing minority is

As applied in *Griswold*, the idea of “penumbras, formed by emanations” is not the easiest to follow.<sup>88</sup> After deciding against grounding a right to marital privacy on the Due Process Clause of the Fourteenth Amendment, Justice Douglas then surveyed a number of individual rights that do not explicitly appear in the Constitution, but the First Amendment has been “construed” to include them. Justice Douglas stated, “the First Amendment has a penumbra” where association and privacy are “protected from governmental intrusion.”<sup>89</sup> In this category, the Court identified a right not to disclose “membership lists of a constitutionally valid association,” “the right to study any particular subject or any foreign language,” and “[t]he right to educate a child in a school of the parents’ choice.”<sup>90</sup> These “penumbral” or “peripheral” rights, Justice Douglas stated, are “formed by emanations from those guarantees that help give them life and substance.”<sup>91</sup> Underscoring the view that particular constitutional “guarantees create zones of privacy,”<sup>92</sup> the Court located these guarantees in the Third, Fourth, Fifth, and Ninth Amendments.<sup>93</sup> Emanations from these guarantees create a “zone of privacy” in which the

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becoming restive; or of prevailing doubt as to whether an emergency already impending may not require a drastic departure.

K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 30 (1934).

88. See Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 445 (1992) (calling Justice Douglas’s analysis in *Griswold* “slipshod”); see also Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421 (1974) (“A logician, I suppose, might have trouble with [the Court’s argument.]”).

89. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

90. *Id.* at 482-83 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958) (right to associate); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (right to educate one’s children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to study the German language)).

91. *Id.* at 484 (citing *Poe v. Ullman*, 367 U.S. 497, 516-22 (Douglas, J., dissenting) (“This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live.” (footnote omitted))).

92. *Id.*

93. *Id.*

Court placed the marital relationship,<sup>94</sup> an idea that Justice Douglas had developed in his dissenting opinion in *Poe v. Ullman* four years earlier.<sup>95</sup>

Justice Harlan's concurring opinion resisted characterizing so fundamental a right as marital privacy as a penumbral right that is "dependent" on the Bill of Rights "or any of their radiations"; instead, he stated, the Due Process Clause of the Fourteenth Amendment protects a right to privacy as a value that is "implicit in the concept of ordered liberty."<sup>96</sup> In his dissent, Justice Black rejected any notion of a constitutional right to privacy "as an emanation from one or more constitutional provisions," finding instead that the government has power "to invade" an individual's privacy "unless prohibited by some specific constitutional provision."<sup>97</sup>

Critics have argued that the penumbral approach to the development of individual rights, even if a legitimate mode of analysis in other decisions, was spurious on the facts in *Griswold*: as Richard A. Posner has explained, "the theory of 'emanations' or peripheral rights implies a connection between core and periphery which is lacking in the case of a right to use contraceptives."<sup>98</sup> Overall, the Court has moved away from "penumbras, formed by emanations" as a source of individual rights,<sup>99</sup> and instead has turned to the Due Process Clause of the Fourteenth Amendment.<sup>100</sup> Yet the

94. *Id.* at 485.

95. *Poe*, 367 U.S. at 517 (Douglas, J., dissenting) ("Liberty' is a conception that sometimes gains content from the emanations of other specific guarantees or from experience with the requirements of a free society." (citation omitted)).

96. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

97. *Id.* at 509-10 (Black, J., dissenting).

98. Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 191.

99. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.12 (1984) ("[W]e reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause.").

100. *See Lawrence v. Texas*, 539 U.S. 558, 594-95 (2003) (Scalia, J., dissenting) ("[*Griswold*] expressly disclaimed any reliance on the doctrine of 'substantive due process,' and grounded the so-called 'right to privacy' in penumbras of constitutional provisions *other than* the Due Process Clause.").

interpretive approach that supports “penumbral reasoning” has not vanished; indeed, it shares a family resemblance with the analytic assumptions of the Incorporation Doctrine.<sup>101</sup> The Court now recognizes that the Fourteenth Amendment incorporates most, although not all, of the Bill of Rights, extending these provisions from the national government to the states,<sup>102</sup> and that, by reverse emanation, the Fifth Amendment’s equality clause incorporates the due-process protections of the Fourteenth Amendment.<sup>103</sup> In both of these settings, constitutional rights may be understood to radiate from the federal domain to the states<sup>104</sup>—or to influence the entire legal system, as in Justice Harlan’s conception of privacy as a constitutive principle of “ordered liberty” that informs all judicial decision making.<sup>105</sup> Justice Goldberg, in his concurring opinion in *Griswold*, thus referred to a process of selective Bill of Rights incorporation by which the “Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights.”<sup>106</sup>

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101. Denning & Reynolds, *supra* note 32, at 1090 (using the phrase “penumbral reasoning”); *see also* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1657 (1993) (using the phrase “penumbral thinking”).

102. *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.2 (4th ed. 2007) (discussing the doctrine of selective incorporation).

103. *See* *Bolling v. Sharpe*, 347 U.S. 497 (1954) (incorporating the Fourteenth Amendment concept of equality into the Due Process Clause of the Fifth Amendment). The Court took the view that “equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive” and that given the prohibition of public school racial segregation in the states “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” *Id.* at 499-500.

104. *See, e.g.*, *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (Cardozo, J.) (“These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.”).

105. *See supra* note 95 and accompanying text.

106. *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring); *see also id.* at 494 n.7 (“[T]hose rights absorbed by the Fourteenth Amendment and applied to the States because they are fundamental apply with

B. *Radiation and Spheres of Sovereignty: The Tenth Amendment and the Anti-Commandeering Principle*

Commentators have had a field day exploring and explaining the penumbra metaphor as a source of individual liberties that are nowhere mentioned in the Constitution. Some see the metaphor as Platonist,<sup>107</sup> others, as Gnostic;<sup>108</sup> still others as “metaphysics”<sup>109</sup>—the pure form of “transcendental nonsense”;<sup>110</sup> and others diagram it as the methodological equivalent of “a plate of ‘sunny-side up eggs.’”<sup>111</sup> Robert H. Bork called the majority opinion in *Griswold* an “intellectual catastrophe,” and insisted that its interpretive methodology “was not meant to be taken seriously.”<sup>112</sup> As one commentator explains, “the penumbral

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equal force and to the same extent against both federal and state governments.”) (Goldberg, J., concurring).

107. See David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 35 (1999) (drawing an analogy between the Sun in Plato’s Republic and Douglas’s metaphor).

108. See Garet, *supra* note 84, at 98 (stating that seeing “*Griswold* as a gnostic writing highlights its emancipatory passion”).

109. See Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2270 (2001).

110. Cf. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) (using the term “transcendental nonsense” to refer to the view of jurisprudence “as an autonomous system of legal concepts, rules, and arguments”).

111. Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 626 (2006); see also John H. Robinson, *The Compromise of ‘38 and the Federal Courts Today*, 73 NOTRE DAME L. REV. 891, 901 & n.53 (1998) (referring to the “bizarre solar imagery” in *Griswold*, but disclaiming the view that “something akin to penumbral decision-making” could not be justified).

112. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 234, 263 (1990). But see Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1377 (1990) (noting that Bork is “derisive about . . . the penumbra concept”). Nevertheless, “Bork believes that courts have the power to create ‘buffer zone[s]’ around constitutional rights ‘by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution.’” *Id.* (citing BORK, *supra*, at 97-99). The penumbra metaphor has come under indirect attack by Justice Scalia. See *Burnham v. Superior Court*, 495 U.S. 604, 627 n.5 (1990) (“The notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a

theory of constitutional rights . . . has been severely criticized, largely because it employs a method that is inconsistent with the dominant interpretive method in our legal culture, which commands that judicial decisions must at least purport to rest upon the interpretation of specific texts.”<sup>113</sup>

Notwithstanding these criticisms, *Griswold* has spawned unlikely progeny in the Rehnquist Court’s reinvigoration of state sovereignty as a limit on national power. The Court’s “New Federalism” doctrine has been built on what Justice Scalia calls the “reasonable implications” of the Constitution’s structure and of the Tenth Amendment in particular.<sup>114</sup> The Court’s approach, developed in a series of Supreme Court decisions that include *Printz*<sup>115</sup> and *New York v. United States*,<sup>116</sup> draws from the same analytic method at work in *Griswold*—as one commentator puts it, “state sovereign immunity . . . might be described as an ‘invisible radiation’ of our Constitution.”<sup>117</sup>

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Platonic check upon the society’s greedy adherence to its traditions can only be described as imperious.”); see also *Ferguson v. City of Charleston*, 532 U.S. 67, 92-93 (2001) (Scalia, J., dissenting) (“Some would argue, I suppose, that testing of the urine is prohibited by some generalized privacy right ‘emanating’ from the ‘penumbras’ of the Constitution (a question that is not before us) . . .”).

113. Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 47 (2005).

114. *Printz v. United States*, 521 U.S. 898, 923-24 & n.13 (1997). The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. See generally Kurt T. Lash, *James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165 (2006) (discussing the federalism revolution of the Rehnquist Court and its reliance on the Tenth Amendment).

115. 521 U.S. at 904-33 (invalidating portions of the Brady Handgun Violence Prevention Act under the Tenth Amendment).

116. *New York v. United States*, 505 U.S. 144 (1992) (holding that the “take title” provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 exceeded Congress’s Commerce Clause powers).

117. Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT’L L. 713, 727 (2002); see also James B. Staab, *The Tenth Amendment and Justice Scalia’s “Split Personality,”* 16 J.L. & POL. 231, 234 n.14 (2000) (pointing to “the implied limitations that the conservative bloc on the Rehnquist Court has been finding in what may be called the ‘penumbras’ of the Tenth and Eleventh amendments”); Timothy Zick, *Statehood as the New Personhood: The*

In the Tenth Amendment context, the phrase “invisible radiation” seems first to have appeared in *Missouri v. Holland*,<sup>118</sup> where the Court considered whether the Migratory Bird Treaty of 1918 invaded the sovereign interests of the states. Justice Holmes stated: “The only question is whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”<sup>119</sup> Holmes rejected the argument that the Tenth Amendment reserves to the states discrete subject matter powers that place absolute limitations antedating the federal Constitution on the national government’s power.<sup>120</sup> To the contrary, the Civil War—what Justice Holmes referred to as “much sweat and blood”—was said to have vanquished any idea of the Tenth Amendment as a substantive limit on national authority, at least as applied to the Treaty Power.<sup>121</sup> *Missouri v. Holland* instead marked the victory of Chief Justice Marshall’s theory of national powers as set out in *McCulloch v. Maryland*: the national government, “[i]n form, and in substance . . . emanates from [the people],” and those powers that are consistent with the “letter and spirit of the constitution, are constitutional.”<sup>122</sup>

Commentators dispute whether *Missouri v. Holland* should be reversed.<sup>123</sup> But outside the Treaty Power, the

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*Discovery of Fundamental “States’ Rights,”* 46 WM. & MARY L. REV. 213, 223-28 (2004) (noting that the Court’s approach to state’s rights “has de-emphasized text in favor of the loosest sort of constitutional construction” that requires the anthropomorphism of the states and builds on the idea of constitutional penumbras). For a historical defense of the Court’s Tenth Amendment doctrine, see generally Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889 (2008).

118. 252 U.S. 416, 434 (1920).

119. *Id.* at 433-34.

120. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1264 (2000).

121. The Constitution provides that the President “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.” U.S. CONST. art. II, § 2, cl. 2.

122. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405, 421 (1819).

123. See Golove, *supra* note 120, at 1077 (referring to the issue as “among the most passionately disputed questions in our constitutional history”). For a canonical defense of *Missouri v. Holland*, see LOUIS HENKIN, FOREIGN AFFAIRS

Rehnquist Court has effectively reversed the priority that Justice Holmes accorded the Tenth Amendment relative to Congress's Article I powers. As Ana Maria Merico-Stephens puts it, "[t]he 'invisible radiations' of the Tenth Amendment have taken on a very visible form in the Court's jurisprudence."<sup>124</sup> For example, in *New York v. United States*, the Court held that the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which obliged the states to take responsibility for state-generated low-level radioactive waste, were "inconsistent with the federal structure of our Government established by the Constitution."<sup>125</sup> Justice O'Connor acknowledged in her opinion for the Court that the Constitution provides no clear substantive answer to where

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AND THE US CONSTITUTION 191 (2d ed. 1996) ("Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material."); see also Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1646 (1999) (positing that Holmes's methodology is correct and the decision is "consistent with the original purpose of the Treaty Clause"). Defenders of state sovereignty argue that the Treaty Power should be subject to the same subject matter limitations that the Constitution imposes on Congress's legislative powers overall. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 450 (1998) (basing this argument on "structural federalism limitations"). "Treaty Power federalists," a commentator explains, "would overturn *Missouri v. Holland* and reify the 'invisible radiations' of the Tenth Amendment and the implicit, yet obvious, federal structure of the Constitution." Michael T. Schwaiger, *A Visible Radiation: Interpreting the History of the Eleventh Amendment as Foreign Policy to Circumscribe the Treaty Power*, 2 DUKE J. CONST. L. & PUB. POL'Y 217, 235 (2007). "[E]ven if the 'invisible radiation' of federalism found in the Tenth Amendment—and the rest of the Constitution's structure—does not trigger barriers to treaty making, . . . the Eleventh Amendment clearly constitutes a *visible radiation* of federalism . . ." *Id.* at 234. And even the staunchest defenders of the Nationalist position acknowledge that the penumbra of the Tenth Amendment radiates a prohibitory influence on national power that produces an anti-commandeering principle. See Golove, *supra* note 120, at 1281-82 ("The second kind of restraint imposed by the Tenth Amendment—or rather the penumbra of the Tenth Amendment— . . . provides the states with certain special immunities from federal regulation—such as the prohibition on Congress to 'commandeer' state legislative or executive processes or subject states to suit in federal or state court.").

124. Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INT'L L. 265, 269-70 (2004).

125. *New York v. United States*, 505 U.S. 144, 177 (1992).

the boundary between national power and state sovereignty ought to exist. Indeed, the Constitution nowhere even mentions the idea of state sovereignty, although the text builds on the existence of states as entities separate from the national government.<sup>126</sup> Justice O'Connor explained: "The Tenth Amendment restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself . . . ."<sup>127</sup> Rather, radiations from the Tenth Amendment bar Congress from using its power to compel state participation in the enforcement of federal programs—the rule is that federal legislation may not "commandeer" state governments by conscripting state officials to carry out federal statutory duties.<sup>128</sup> On this basis, the Court in *Printz* invalidated portions of a federal statute regulating handgun sales that required state police officials to help administer the law by performing background checks.<sup>129</sup> Just as the right to privacy is located in the penumbras of multiple amendments, so state sovereignty finds its home in a penumbra of the Tenth Amendment and the overall constitutional structure. "State authority, like Plato's ultimate reality," Jay S. Bybee writes, "cannot be determined by reference to the thing itself, but only by studied reflection on the shape of something else, namely, the powers of Congress."<sup>130</sup> He adds: "The Tenth Amendment may be the most important of the shadows on the constitutional wall, but it is not the only such shadow."<sup>131</sup> Critics of the Court's current federalism doctrine

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126. See *McCulloch*, 17 U.S. at 403 ("No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."); see also Gary Lawson, *A Truism With Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 493 (2008) (acknowledging that the Constitution lacks "a specific 'Federalism Clause'").

127. *New York*, 505 U.S. at 156.

128. *Id.* at 175.

129. *Printz v. United States*, 521 U.S. 898, 923-24 (1997) (explaining that a law that violates "the principle of state sovereignty" is not a law that carries out Executive function consistent with the Constitution).

130. Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 HARV. J.L. & PUB. POL'Y 551, 576 (2000).

131. *Id.* at 556.

not surprisingly draw unfavorable comparisons between its use of penumbral analysis and *Griswold*.<sup>132</sup>

C. *Radiation and Spheres of Power: The Eleventh Amendment and Tenth Amendment Shadows*

The radiating effects of the Tenth Amendment not only constrain Congressional power, but also permeate the Eleventh Amendment and influence the Court's interpretation of judicial power.<sup>133</sup> In *Seminole Tribe of Florida v. Florida*,<sup>134</sup> the Court held that Congress lacks power to authorize federal court actions by Indian tribes against a state to enforce a federal law enacted under the Indian Commerce Clause.<sup>135</sup> The Court disclaimed a literal reading of the Eleventh Amendment, and instead relied on emanations from the Tenth Amendment that are said to support a "presupposition" under the Eleventh Amendment about the relation between state immunity from suit and the protection of state dignity.<sup>136</sup> Thus, in *Alden v. Maine*,<sup>137</sup>

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132. See Denning & Reynolds, *supra* note 32, at 1103-04 ("[B]efore reading his [Printz] dissent from the bench, Justice John Paul Stevens 'remarked spontaneously that Justice Scalia's opinion for the Court reminded him of Justice Douglas's opinion in . . . *Griswold*[.] . . . which extrapolated a right to privacy from the Constitution's 'penumbras' and 'emanations.'" (quoting Jeffrey Rosen, *Dual Sovereigns*, THE NEW REPUBLIC, July 28, 1997, at 16, 17)).

133. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." U.S. CONST. amend. XI.

134. 517 U.S. 44 (1996).

135. *Id.* at 47; see also U.S. Const. art. I, § 8, cl. 3 (commonly referred to as the Indian Commerce Clause).

136. 517 U.S. at 54. "Although the text of the Amendment," Chief Justice Rehnquist wrote in the majority opinion, "would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" *Id.* (internal citation omitted; alteration in original); see John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1669-70 (2004) (questioning the Court's purposive approach to the Eleventh Amendment). *But see* Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1696-97 (2009) (reconciling the Court's approach to sovereign immunity with a strict textual reading of the Constitution); Vázquez, *supra* note 117, at 727-28 (calling state sovereign immunity "an invisible radiation from the Tenth Amendment")

the Court held that Congress lacks power “to subject nonconsenting States to private suits in their own courts”<sup>138</sup>—here, a lawsuit aimed at enforcing federal statutory rights concerning fair labor and wage provisions that Congress had enacted under the Commerce Clause.<sup>139</sup> The Eleventh Amendment nowhere refers to state judicial power, but as Justice Kennedy explained: “To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States’ sovereign immunity . . . .”<sup>140</sup> The Court continued:

Rather, as the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.<sup>141</sup>

Commentators have rationalized this result as an “invisible radiation” of the Tenth Amendment’s anti-commandeering principle which protects state dignity through the Eleventh Amendment even though state judicial power is not mentioned in the Tenth Amendment.<sup>142</sup> This principle has been carried over into the administrative sphere, as well; in *Federal Maritime Commission v. South Carolina State Ports Authority*,<sup>143</sup> the Court held that state dignity prevents a federal agency from hearing an

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and not the Eleventh Amendment). For a discussion of dignity as a component of state sovereign immunity, see Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 6 (2003) (discussing the “historical pedigree” of the concept of state dignity as an aspect of immunity).

137. 527 U.S. 706 (1999).

138. *Id.* at 730.

139. *Id.* at 711-12.

140. *Id.* at 730.

141. *Id.* at 713.

142. See Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 319, 321 (1998) (arguing that the Tenth Amendment anti-commandeering principle applies to state legislatures and executive officials, and also to state judges).

143. 535 U.S. 743 (2002).

individual complaint against a nonconsenting state.<sup>144</sup> Despite disparate reactions to the Court's Eleventh Amendment cases,<sup>145</sup> many commentators associate the decisions with penumbral reasoning.<sup>146</sup> Indeed, proponents urge the adoption of a doctrine of "penumbral sovereign immunity" to protect against invasions of sovereignty that do not fall within the sovereign core but nevertheless implicate peripheral concerns.<sup>147</sup>

### III. REORIENTING THE STATE ACTION DOCTRINE

Both penumbral reasoning and structural interpretation form an important feature of American

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144. *Id.* at 760 (calling it "an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts," so that it cannot be "acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency").

145. For a list of sources reflecting the range of disagreement, see RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 941 & n.9 (6th ed. 2009) (referring to the "cascade of scholarly commentary" about *Alden* alone).

146. *See, e.g.*, Tribe, *supra* note 32, at 170-71 (drawing a comparison between the Court's approach to sovereign immunity and "the distinct but somewhat similar method of Justice Douglas"). "[T]he meaning of the Constitution—in matters of governmental architecture neither less nor more than on questions of individual rights—cannot be captured through examination of the linear text alone . . . ." *Id.* at 171; *see also* Jim Chen, Correspondence, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1798 (2004) (discussing "penumbral" analysis in the Court's approach to the Eleventh Amendment). For another spatial metaphor, see Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002) (stereoscopic metaphor). Some commentators have moved from spatial metaphors to aural metaphors. *See, e.g.*, Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 253-54 (2005) (referring to "polyphonic" federalism, and defending the aural metaphor because it permits "the interaction of multiple independent voices").

147. *See* Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 797 (2008). Florey uses the term "penumbral sovereign immunity" to refer to "cases that do not fit the classic contours of a suit barred by sovereign immunity—that is, a suit for monetary relief directly against an unconsenting sovereign—but in which the sovereign's interests, or the rationales underlying sovereign immunity, nonetheless influence the court's decision making." *Id.* (footnote omitted).

constitutional practice in cases involving individual rights and government power. Indeed, we might say more simply that these analytic methods are a pervasive feature of American constitutional law: as Judge Kozinski and Professor Volokh aptly put it, “[l]ike it or not, our constitutional law is the law of penumbras and emanations. Few constitutional decisions, from *Marbury v. Madison* onward, are unambiguously dictated by the constitutional text.”<sup>148</sup> The question remains, however, whether these analytic methods are similar in the relevant sense to interpretive practices abroad that allow constitutional rights to migrate across domains that conventionally are regarded as separate and distinct, and so permit public values to interpenetrate private relations.<sup>149</sup> This Part develops an affirmative answer to that question and argues that “radiating effects, American style” already are at work in some of the exceptions that the Court has carved out from the state action requirement. I then ask whether making this practice explicit in other private settings would be—to borrow again from Judge Kozinski and Professor Volokh—“a penumbra too far.”<sup>150</sup>

#### A. *Radiating Effect and the Migration of Public Rights*

The perils of comparative constitutional analysis are too well known to require an extended discussion. Problems of translation may obscure the meaning of a foreign legal term; even where legal systems share a common language, institutional or cultural context may radically alter the significance of words that superficially appear identical: “communication” across legal systems, one commentator pessimistically says, “is doomed to imperfection.”<sup>151</sup> The fact

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148. Kozinski & Volokh, *supra* note 101, at 1656.

149. I take no position on whether the Court’s use of these analytic methods is appropriate in the cases surveyed, or whether the results are doctrinally or normatively correct.

150. Kozinski & Volokh, *supra* note 101, at 1639.

151. Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 50 (1998); see also Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 1, 51 (2004) (“[T]he viability of doctrinal or structural transplants is often a function of the ‘constitutional and social context’ in which they operate, such as the design of other legal institutions and the facts of political sociology.” (quoting Matthew D. Adler, *Can Constitutional Borrowing Be Justified? A*

that foreign law speaks of a “radiating effect” while American law speaks of “invisible radiations” may be an interesting observation, but show not a whit of methodological convergence between the two systems—especially not a convergence that is relevant to the question that opened this Article: Whom does a constitution command?

Even taking a cautious attitude toward comparative constitutional analysis, I argue that the examples discussed in Part II show a methodological convergence that is more real than apparent. *Drittwirkung*'s radiating effect assumes that constitutional norms constitute basic values that pervade the entire legal system, which is understood to comprise both a public and a private sphere. The values that instantiate constitutional rights do not remain settled within the public sphere, where they affect the relations of an individual to the government, but rather also penetrate the private sphere, where they affect an individual's relation to other individuals.<sup>152</sup> The American version of

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*Comment on Tushnet*, 1 U. PA. J. CONST. L. 350, 356 (1998)); TUSHNET, *supra* note 15, at 4-5 (discussing the interpretive difficulties created by “language barriers . . . [and] legal cultures” in comparative constitutional analysis).

152. The practice assumes that constitutional rights have an influence that is uneven and contextual. For example, a Dutch commentator observes that in the Netherlands the field of labor law has been more receptive to horizontal effect than, say, that of property, although even in the latter field cases also can be cited. See Bart J. de Vos, *The Netherlands*, in FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION: I. A COMPARATIVE OVERVIEW, *supra* note 6, at 405, 441.

Similarly, in an earlier work I surveyed the effect of constitutional rights to health and education on judicial interpretation of contracts, tort remedies, and property relations in Brazil, Indonesia, India, Nigeria, and South Africa, observing that the courts in those countries deploy public rights as interpretive resources that affect their construction and application of private law categories, but they do so in ways that are fact-dependent and highly attentive to the relationships involved. See Helen Hershkoff, *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, in COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 268, 268-302 (Varun Gauri & Daniel M. Brinks eds., 2008). In the countries that I investigated, courts facilitated the migration of public values into private law and in the process reordered relations involving market activity. *Id.* at 289. As the India Supreme Court explained in a decision requiring a private insurance company to offer contract terms consistent with that country's Fundamental Rights and Directive Principles:

radiating effect, as illustrated by *Griswold* and the Tenth and Eleventh Amendment cases, converges with the foreign practice of horizontality in two significant ways that are pertinent to a relaxation of the state action doctrine: first, the Court's use of penumbral reasoning facilitates the migration of constitutional norms across domains and into unfamiliar settings; and second, in the process of resettlement, public values are enforced as a matter of "degree" according to a balancing of the relations and interests that are at stake.<sup>153</sup> Both of these features of "radiating effects, American style" are critical to the possibility of rearranging the state action doctrine from its current binary approach to one that looks at constitutional rights as values that may be enforced along a continuum depending on the context and the interests involved.

1. *Spheres of Privacy*. Justice Douglas wrote in *Griswold* that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>154</sup> The question is whether we can read *Griswold* to support the migration of constitutional rights in ways that would permit relaxation of the state action doctrine in the sense of allowing public values to interpenetrate and rearrange private relations. One commentator has suggested that Justice Douglas's twin metaphors may be read "as referring to penumbral rights that are essential to the point or purpose of the enumerated rights,"<sup>155</sup> while another has suggested that penumbral rights serve as a "protective shell" for rights located at the textual core.<sup>156</sup> This approach is consistent with the Court's

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We make it clear at this juncture that the insurer is free to evolve a policy based on business principles and conditions before floating the policy to the general public offering on insurance of the life of the insured but . . . insurance being a social security measure, it should be consistent with the constitutional animation and conscience of socio-economic justice adumbrated in the Constitution . . . .

L.I.C. of India v. Consumer Educ. & Research Ctr., A.I.R. 1995 S.C. 1811, 1819 (India), available at <http://judis.nic.in/>.

153. See *supra* note 77 and accompanying text.

154. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

155. Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 CONST. COMMENT. 75, 76 (1991).

156. Kanter, *supra* note 111, at 626 ("The central idea is that each textually explicit core right also has a protective shell, and a set of corollary or derivative

prior use of the term penumbra.<sup>157</sup> And to the extent we equate “core” rights with horizontality’s concept of “an objective order of values,”<sup>158</sup> this reading lends some support to enforcing public rights in the private sphere in situations where their enforcement is considered to be critical to the protection of a core constitutional commitment. In this account, a penumbral right promotes the purpose of a public value, which is regarded as foundational. Mark Tushnet has characterized this reading of *Griswold* as “plausible,” but nevertheless as insufficient because it does not fully “capture” the metaphoric sense of penumbra as going beyond purpose or foundation.<sup>159</sup>

Alternatively, we might read *Griswold* as saying that every amendment that has been construed to support a right to privacy emanates a penumbra, and these penumbras can be bundled together and be accorded the status of a new right. Steven Kanter, for example, offers a reading of this sort, calling it the “Whole is Greater than the Sum of Its Parts.”<sup>160</sup> This approach aligns *Griswold* with a structural reading of the Constitution that looks at the document holistically, with rights and provisions forming an architectonic frame.<sup>161</sup> From the perspective of horizontality, however, this interpretation misses the mark: horizontality assumes that existing rights are adapted to new contexts, not that new public rights are created for new contexts.

We also might view *Griswold* through a spatial metaphor that imagines an impermeable boundary separating different domains such as the public and the private. Indeed, Mark Tushnet has argued that the best reading of *Griswold*—one that is faithful to the language of penumbras and emanations—views every constitutional provision as fully protecting “matters within its domain.

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rights. The Court describes these necessarily implied or peripheral rights as penumbras . . .”).

157. See *supra* note 85 and accompanying text.

158. See *supra* note 56 and accompanying text.

159. Tushnet, *supra* note 155, at 76 (referring to the “metaphors of penumbras”).

160. Kanter, *supra* note 111, at 640.

161. See *TRIBE*, *supra* note 32, at 170 (arguing that Justice Douglas used a structural approach in *Griswold* “as he assembled various provisions of the Bill of Rights into a constitutionally-guaranteed right of privacy”).

Yet, to assure that those matters actually receive[] the full protection to which they are entitled, it is necessary to protect matters outside the domain of the specific amendments.”<sup>162</sup> To illustrate, Professor Tushnet turns to Justice Douglas’s own example of *NAACP v. Alabama*, which Tushnet interprets as creating a prophylactic rule against compulsory disclosure of membership lists as a way to protect the right of association that the First Amendment guarantees at its core.<sup>163</sup> The difficulty of drawing a parallel between this interpretation of *Griswold* and the methodological approach of horizontality is that the latter assumes that rights enforced outside the public domain will be enforced according to a principle of proportionality that takes account of the facts and circumstances of the relationships at issue. Tushnet, by contrast, does not place these penumbral rights along a continuum. He says, instead, “[t]he degree of protection available to matters within the area of overlap is as substantial as the degree of protection available to matters within the core domains of the specific constitutional provisions.”<sup>164</sup>

However, we need not understand *Griswold* as taking this rule-like approach to First Amendment rights. Instead, we might read Justice Douglas’s opinion as associating various provisions of the Constitution with a value or principle of privacy, which exists in particular “zones.” It is this value or principle that the Court permits to migrate (or recognizes its “radiations,” to use Justice Harlan’s characterization of the majority’s approach)<sup>165</sup> from accepted social contexts, like membership in a political organization, to a different domain entirely—the marital bedroom. Privacy thus is not a right in the sense of laying down a rule that commands a particular result in all cases; rather, it is a value or principle that is weighed against other significant interests. In this vein, Kenneth L. Karst called the right recognized in *Griswold* the “freedom of intimate association”—“a principle that bears on constitutional interest balancing by helping to establish the weight to be

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162. Tushnet, *supra* note 155, at 76.

163. *Id.* at 76 & n.10.

164. *Id.* at 78.

165. See John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172, 176 n.14 (2009) (discussing Justice Harlan’s use of the word “radiations”).

assigned to one side of the balance.”<sup>166</sup> He underscored that interest balancing also may be accomplished through the Court’s selection of tiers of review.<sup>167</sup> This understanding of penumbral analysis in *Griswold* comes closest to the analytic method of horizontality, which would see privacy as a value that influences judicial decision making but as a matter of degree depending on the context and the relations that are at stake.

2. *Spheres of Sovereignty*. The case for methodological convergence in the relevant sense between the Court’s approach to the Tenth Amendment and to the practice of radiating effect can be more quickly stated. The text of the Tenth Amendment “reserves” to the states rights not assigned to the federal government.<sup>168</sup> For this reason, the amendment sometimes is described as a “boundary marker” between Congress and the states that prevents the federal government “through a process of legislative osmosis” from absorbing the powers of the states.<sup>169</sup> In *Missouri v. Holland*, the state plaintiff ascribed to the Tenth Amendment a broader reading, which Justice Holmes rejected as no more than an “invisible radiation.”<sup>170</sup>

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166. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627 (1980).

167. *Id.* at 626-28.

168. See U.S. CONST. amend. X.

169. Phillip H. Howard, *A Constitutional Crossfire: State Sovereignty and the Brady Law*, 36 SANTA CLARA L. REV. 151, 184 (1995).

170. *Missouri v. Holland*, 252 U.S. 416, 434 (1920). The phrase, as Professor Neuman has put it, “presents a classic Holmes aphorism: it is pithy, it is dismissive, and it is hard to say exactly what it means.” Neuman, *supra* note 123, at 1646; see also Thomas C. Grey, *Molecular Motions, The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 35 (1995) (“[W]hen we add Holmes’s metaphor of core and penumbra to the metaphor of structure and interstices, we picture the gaps as already occupied by the overlapping penumbral policies that radiate out from the adjoining concepts or rules.”); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 10 (1999), (“To the extent that radiations from one sphere into another existed . . . judicial boundary pricking demarcated where the radiations ceased.”). For further discussion of “invisible radiation,” see Merico-Stephens, *supra* note 124, at 269-71 (arguing that the Tenth Amendment’s invisible radiation influences the Court’s construction of Congress’s Section 5 power); Vázquez, *supra* note 117, at 727-28 (referring to the anti-commandeering principle “as an invisible radiation from the Tenth Amendment”).

Cases such as *New York* and *Printz* ascribe to the Tenth Amendment certain extra-textual values and principles, captured in the term “dignity,” that emanate throughout the constitutional structure and influence all relations between the states and the federal government whatever their domain—whether legislative, executive, or judicial. Some commentators would complete this picture of Tenth Amendment radiation by including in the constitutional calculus an invisible radiation from the Supremacy Clause; combined, the two constitutional provisions give the Court the interpretive material that allows for the weighing of each sovereign’s interests.<sup>171</sup> Others suggest that Tenth Amendment radiations are not trumps that defeat federal exercises of power, but rather foundational values that predate the federal Constitution and “must be tested in light of the national interest at stake.”<sup>172</sup> By any one of these interpretations, the values or principles of state sovereignty—Justice Scalia has called them “essential postulate[s]”<sup>173</sup>—cross over into the national sphere, influencing the Court’s construction of Congress’s Article I power, the President’s Article II power, and the Court’s Article III power. Precisely where the boundary between state and nation sits is “necessarily one of degree”;<sup>174</sup> at various points, the Court has toughened the evidentiary standard that Congress must meet in order to cross the constitutional boundary between the two respective spheres of authority.<sup>175</sup> But similar to the *Lüth* Court’s approach to the Basic Law of Germany,<sup>176</sup> state sovereignty functions in

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171. See G. Sidney Buchanan, *The Scope of State Autonomy Under the United States Constitution*, 37 HOUS. L. REV. 341, 430 (2000) (discussing the invisible radiation of the Tenth Amendment and of the Supremacy Clause).

172. Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1035-36 (2010); see also Benjamin Beiter, *Beyond Medellín: Reconsidering Federalism Limits on the Treaty Power*, 85 NOTRE DAME L. REV. 1163, 1167-68 (2010).

173. *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)) (alteration in original).

174. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

175. See Alistair E. Newbern, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 CALIF. L. REV. 1575, 1607 (2000) (“[The *Lopez* Court] drew a firm line between the roles of nation and state. *Lopez* showed that this line could not be automatically crossed by the magical incantation, ‘in interstate commerce.’”).

176. See *supra* note 55 and accompanying text.

the Court's decisions as a value that must be considered in any context in which it is implicated.

3. *Spheres of Institutional Power.* The Court's approach to the Eleventh Amendment likewise reflects the migration of constitutional norms—a principle of dignity similar to that protected by the Tenth Amendment—across spheres. As the previous Part showed, the Court's approach to the Eleventh Amendment has elevated state sovereign immunity to “a ‘background principle’ . . . (understood as immunity to suit), . . . that operate[s] beyond its limited codification in the Amendment, dealing solely with federal citizen-state diversity jurisdiction.”<sup>177</sup> State immunity from suit has extended to cases heard under the arising-under jurisdiction, and the scope of the immunity, “confirm[ed] by the Tenth Amendment”<sup>178</sup> also constrains Congressional power to create federal remedies enforceable in federal court. Moreover, the Eleventh Amendment indirectly influences the scope of state immunity in state court where it blocks private actors from enforcing federal law or using federal remedies. And it radiates from the judicial sphere into the executive domain where it bars a private administrative remedy against a nonconsenting state.<sup>179</sup>

State sovereign immunity thus has been interpreted to have a content that goes beyond the text of the Eleventh Amendment; rather, it is treated as a value or a principle that is “embedded in our constitutional structure and retained by the States when they joined the Union.”<sup>180</sup> The principle of state dignity radiates from the structure of the Constitution to all aspects of judicial decision making, and is not confined to the core question of the scope of federal diversity jurisdiction. At least in the domain of Congress's Section 5 power, the state's immunity does not operate in rule-like fashion, but rather constrains Congress in ways that are proportionate to a demonstrated pattern of the

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177. *Alden v. Maine*, 527 U.S. 706, 760 (1999) (Souter, J., dissenting) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996)).

178. *Id.* at 761 (Souter, J., dissenting) (referencing Kennedy's majority opinion at 713-14) (alteration in original).

179. *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) (“[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity.”).

180. *Id.* at 754.

state's violation of federal rights.<sup>181</sup> Thus, sovereign immunity is not a blanket bar in the Section 5 context, but rather a value or principle that is weighed in the Court's analysis. Indeed, even in a case involving suit against a non-consenting state, the immunity lacks the rigidity of an absolute rule and instead may be waived or overcome if the United States initiates the action.<sup>182</sup>

### B. *Horizontality and the U.S. State Action Doctrine*

Proposals that the Court “refocus”<sup>183</sup> or “transcend[]”<sup>184</sup> the state action doctrine are legion: many of these proposals urge adoption of a balancing approach that would assess the strength of the private interest against that of a public right. These proposals assume the conceptual vitality of a private sphere, but imagine that a public right has interpretive capacity to hurdle the public/private divide. Dean Chemerinsky, for example, has written that the state action doctrine is “unnecessary,” and that the Court should instead proceed to the merits to determine whether sufficient justification exists for the alleged constitutional violation.<sup>185</sup> Mark Tushnet similarly has argued that “there can be no doctrine of state action that is independent of the applicable substantive constitutional law.”<sup>186</sup> Other commentators likewise have “urged the Court to balance the

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181. See Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 20-25 (2001) (discussing proportionality analysis under the Eleventh Amendment).

182. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565-67 (2002) (discussing some “enduring puzzles” about the Eleventh Amendment as a jurisdictional bar to suit in federal court); see also Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249, 251 (discussing immunity waiver in the interstate context).

183. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 246 (1985) (entitling chapter sixteen: “Refocusing the ‘State Action’ Inquiry: Separating State Acts from State Actors”).

184. Gardbaum, *supra* note 3, at 422 (arguing for “transcending” the state action doctrine).

185. Chemerinsky, *supra* note 27, at 506.

186. Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 383 (1988).

competing private and public claims more openly and explicitly.”<sup>187</sup>

Commentators generally insist that any proposal for change must be considered in the context of a system's overall structure and content. Professor Tribe, who has invited the Court to move into “the curvature of constitutional space,” nevertheless maintains that any call for legal reform must be consistent with the Constitution's “basic architecture”: “one must attend,” he emphasizes, “to the ‘topology’ of the edifice.”<sup>188</sup> This Section suggests that the analytic method needed to support alteration of the state action doctrine draws comfortably from indigenous interpretive approaches—“spooky” and “scary” analytic methods that are in fact typical of American law.<sup>189</sup> Like the practice of horizontality, the American version of radiating effect recognizes the migration of rights across borders, and it approaches public norms contextually depending on the relations and interests at stake. Indeed, this analytic method supports the exceptions that the Court already has carved out from the state action doctrine. These examples cannot be dismissed as involving only the expansion of public rights, but rather—as in the German and other foreign cases—reflect the rearrangement of private relations in the light of constitutional values.

1. *State Action and Racial Equality*. David Strauss has written about “state action after the civil rights era,” and he, like other commentators, has emphasized the critical role that eradicating racial discrimination played in the Court's “great state action cases of the 1940s, 1950s, and

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187. Peretti, *supra* note 26, at 287; *see, e.g.*, Thomas G. Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146, 149 (1976) (calling for “the direct balancing of competing rights”); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 7 (1961) (urging that a court identify the different interests that “compete for respect in each case” pertinent to the state action requirement).

188. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1236 (1995). The literature on the contested nature of constitutional structure is voluminous. *See, e.g.*, Kenneth M. Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 431 (1983) (discussing the role of “[i]mage construction” in legal analysis).

189. *See supra* note 31 and accompanying text.

1960s.”<sup>190</sup> In these cases, the Court rarely failed to find state action: it retained the form of the legal barrier, yet nevertheless hurdled it—while failing to specify the factors it was considering, the weight assigned to each factor, or the motivating framework.<sup>191</sup> The Court’s holdings reflect the pervasive nature of racial discrimination in America at mid-century, involving private relations such as a restaurant’s refusal to serve a black customer<sup>192</sup> or a homeowner’s refusal to sell property to a black purchaser.<sup>193</sup> In extending constitutional protection against private activities that discriminated on the basis of race, these cases are said to have “rejected the most formalistic understanding of state action,”<sup>194</sup> to have found a constitutional violation “in a factual context that went well beyond existing precedent,”<sup>195</sup> and to be so “particularistic” as to be “without precedent.”<sup>196</sup> Efforts have been made to explain the cases on an attitudinal model,<sup>197</sup> as a matter of constitutional culture,<sup>198</sup>

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190. Strauss, *supra* note 5, at 409; see David S. Elkind, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 705 (1974) (“‘State action’ is a field whose emotional heyday may lie in the equal protection litigation of the past . . .”).

191. See Peretti, *supra* note 26, at 287 (“The Court also seems at times to be guided by factors not included in its formal doctrines, for example, the constitutional strength of the countervailing private interests and the presence of a race discrimination claim.”).

192. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716 (1961) (“In this action for declaratory and injunctive relief it is admitted that the Eagle Coffee Shoppe, Inc., a restaurant located within an off-street automobile parking building in Wilmington, Delaware, has refused to serve appellant food or drink solely because he is a Negro.”).

193. *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948) (“These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property.”).

194. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 269 (1991).

195. *Id.* at 270.

196. Thomas P. Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458, 1458, 1467 (1961).

197. See Peretti, *supra* note 26, at 283-90 (discussing but rejecting the attitudinal model).

198. See Klarman, *supra* note 194, at 276 (considering this argument).

as a matter of regime politics,<sup>199</sup> and as evidence of the limited power of “extrajudicial constitutional pressure.”<sup>200</sup> Justice Harlan, in dissent, referred to the Court’s relaxation of the state action doctrine in *Evans v. Newton*<sup>201</sup> as “more the product of human impulses . . . than of solid constitutional thinking.”<sup>202</sup>

Implicit in Justice Harlan’s criticism is the view that these “human impulses”—at the time, aimed at protecting African Americans from subordination, stigma, intimidation, and violence—were detached from constitutional values and simply expressions of sympathy or of political activism. The theory of radiating effect suggests that we attend to the normative content of the Court’s interpretive practice, and understand it not as a matter of judicial preference, but rather as an expression of the constitutional principle of equality that informs the entire constitutional edifice.<sup>203</sup> As Archibald Cox wrote in his 1965 foreword to the *Harvard Law Review*, “[f]or a decade and a half the Supreme Court has been broadening and deepening the constitutional significance of our national commitment to Equality. . . . Once loosed, the idea of Equality is not easily cabined.”<sup>204</sup> Professor Cox associated Equality—capitalized throughout the Foreword—with the government’s duty to protect individuals against private, as well as public, invasions of constitutional values.<sup>205</sup> Faced with private threats to the constitutional norm of anti-discrimination, the Court found ways to provide a remedy—

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199. See Peretti, *supra* note 26, at 290-97 (exploring this argument).

200. Schmidt, *supra* note 11, at 829.

201. 382 U.S. 296 (1966).

202. *Id.* at 315 (Harlan, J., dissenting).

203. See generally Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102-42 (2007) (tracing the idea of equality in American constitutional law with particular attention to “group subordination”).

204. Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1967).

205. *Id.* at 108 (“Any government committed to the promotion of racial equality and other human rights must concern itself, if it can, with the activities of private individuals.”); see also *id.* at 93 (referring to “the political theory which acknowledges the duty of government to provide jobs, social security, medical care, and housing [that] extends to the field of human rights and imposes an obligation to promote liberty, equality, and dignity”).

not laying down a hard and fast rule for all cases, but rather attending carefully to the relations and interests at stake and slowly adapting the Equality value to the situations at hand.

2. *State Action and Property Rights*. Some of the Court's decisions in this earlier period, particularly in cases involving alleged constitutional violations by private property owners, explicitly adopted a balancing approach that treats constitutional rights as values to be assessed contextually given the interests at stake.<sup>206</sup> *Marsh v. Alabama*,<sup>207</sup> identified with the "public function" exception to the state action doctrine,<sup>208</sup> treated a "company town" as a public municipality for purposes of First Amendment protection—here, requiring the property owner to open up the town to Jehovah's Witnesses who wanted to distribute proselytizing literature. Justice Douglas's opinion for the *Marsh* majority gestured toward a balancing approach that weighed the competing constitutional values of property and speech.<sup>209</sup>

Similarly, in *Burton v. Wilmington Parking Authority*,<sup>210</sup> associated with the "entanglement" exception to the state action requirement,<sup>211</sup> the Court emphasized the importance of a contextual assessment to the state action inquiry: "Only by sifting facts and weighing circumstances can the

206. See *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (discussing the need to balance the constitutional values of speech and property).

207. 326 U.S. 501 (1946).

208. See Erwin Chemerinsky, *State Action*, 618 PLI/LIT 183, 187, 199 (1999) (explaining that the public function exception "says that a private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government").

209. *Marsh*, 326 U.S. at 509 ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.").

210. 365 U.S. 715 (1961).

211. See Chemerinsky, *supra* note 208, at 199 (defining the entanglement exception as providing "that private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct"). Some commentators refer to the exception as the "symbiotic relation" test. See, e.g., Lara Womack & Douglas Timmons, *Homeowner Associations: Are They Private Governments?*, 29 REAL EST. L.J. 322, 331 (2001).

nonobvious involvement of the State in private conduct be attributed its true significance.”<sup>212</sup> *Burton* has been called an opinion that is “vague and obscure”;<sup>213</sup> the Court’s refusal to extend its approach in later cases also has been lamented as a “missed opportunity” by those critical of current doctrine.<sup>214</sup> In *Burton*, the Court assessed the depth of the state’s involvement with the private activity under challenge to determine whether constitutional protection was warranted—declining to categorize the forms of involvement that would be required in all cases—and again allowed a principle of equality to interpenetrate and to rearrange private relations. The Court explained:

Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an “impossible task” which “This Court has never attempted.”<sup>215</sup>

In later cases, the Court continued to undertake a “necessarily fact-bound inquiry” in its assessment of state entanglement,<sup>216</sup> but it has tended toward what is called a neoformalist position that makes it more difficult to hurdle the public/private divide.<sup>217</sup>

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212. *Burton*, 365 U.S. at 722.

213. Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 382 (1963).

214. Quinn, *supra* note 187, at 158.

215. *Burton*, 365 U.S. at 722 (quoting *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 556 (1947)).

216. See, e.g., *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298 (2001) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)).

217. See *Developments in the Law*, *supra* note 5, at 1262.

C. *Overcoming Objections: The Corporation as “the Penumbra of the State”*

Forty years ago, Professor Black called the Court’s state action doctrine in cases involving racial discrimination by private actors a “conceptual disaster area”;<sup>218</sup> twenty years later, Justice O’Connor, in a dissenting opinion, offered the view that the “cases deciding when private action might be deemed that of the state have not been a model of consistency.”<sup>219</sup> In the intervening years the Court has not clarified its justification for retaining a state action threshold as a condition for constitutional enforcement; rather, it simply has made the requirement more rigid and the barrier between private and public almost insurmountable.<sup>220</sup> Against this background, one easily can forget how close the U.S. Supreme Court came to reorienting the state action doctrine in ways that would have extended constitutional protection to individuals in a number of private settings and the role that contextual balancing played in the relevant cases.<sup>221</sup> The transition from the Vinson and Warren Courts to the Burger and Rehnquist Courts marked a sea change in judicial attitudes toward the doctrine—“a dramatic shift,” as one commentator puts it, “from the Court always finding state

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218. Black, *supra* note 4, at 95.

219. *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting).

220. See G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 379 (1997) (referring to the “ultimate contraction” of the public function exception to the state action doctrine).

221. William E. Forbath makes a similar point that a constitutional right to welfare was a near miss. See William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present*, 39 TULSA L. REV. 597, 612 (2004) (“[T]he Court seemed to be verging on judicial recognition of something very much like rights to minimum welfare, education, and other forms of social provision, when the Republican victory in the 1968 presidential election deprived the Court’s liberals of the votes they needed to carry the process forward.”). These two developments are conceptually related. See Hershkoff, *supra* note 2, at 1552 & n.157 (discussing the relation between the state action doctrine and constitutional positive rights, and collecting sources). See generally Helen Hershkoff, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, 69 ALB. L. REV. 553 (2006) (drawing a connection between constitutional positive rights and a relaxed state action doctrine).

action in the leading cases from 1940 to 1969 to a rejection of most state action claims in the two decades that followed.”<sup>222</sup> Michael Klarman thus refers to the “evisceration” of the state action doctrine in the earlier period and its “resurrection” in the latter.<sup>223</sup>

Adopting a balancing test instead of the current threshold state action requirement inevitably would entail judicial costs: a balancing approach of any sort entails costs,<sup>224</sup> and some commentators might support the retention of current state action doctrine on that basis.<sup>225</sup> But balancing is a pervasive feature of U.S. constitutional analysis;<sup>226</sup> its absence in the state action context seems to require explanation.<sup>227</sup> Indeed, the literature is replete with speculation about the Court’s continuing adherence to the state action requirement, and I will do no more than briefly rehearse these arguments.<sup>228</sup> Some commentators predict that extending public rights horizontally would dilute

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222. Peretti, *supra* note 26, at 281.

223. Klarman, *supra* note 194, at 269-303.

224. *Cf. Edmondson*, 500 U.S. at 645 (Scalia, J., dissenting) (objecting to the Court attributing state action to a private litigant’s use of race-based peremptory challenges on the ground that the decision will contribute to judicial administrative costs and add “complexity . . . to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case”).

225. *See* Chemerinsky, *supra* note 208, at 194 n.26 (acknowledging the argument that balancing “would have a cost in terms of judicial resources”). Moreover, “some would argue that it is better for courts to avoid such constant weighing of competing social values.” *Id.* *But see* Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 *CARDOZO L. REV.* 99, 121 (2004) (urging reform of the state action doctrine by “giving weight to substantive context”).

226. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 943-44 (1987) (referring to the “widespread, if not dominant” use of balancing in U.S. constitutional interpretation).

227. Mattias Kumm and Víctor Ferreres Comella raise this question in their analysis of the American state action doctrine. *See* Kumm & Comella, *supra* note 74, at 279, 276-83 (“Why then should the Supreme Court not embrace the more open and honest proportionality test, instead of hiding between categorizations of various kinds that just obfuscate the relevant normative concerns?”).

228. I have addressed these arguments in earlier writing in a related context. *See* Hershkoff, *supra* note 2, at 1571-82.

constitutional protection overall,<sup>229</sup> a live concern if one assumes that constitutional rights must be enforced to the full extent or not at all.<sup>230</sup> Others caution that eliminating the state action requirement would abridge an individual's liberty to make decisions free from government regulation and so undermine autonomy.<sup>231</sup> Here one might recall Professor Black's rejoinder, which seems as apposite today as it was when published in the *Harvard Law Review* more than forty years ago: "I have . . . made the point . . . , but it must be said over and over again," Black wrote, "until it comes to be thoroughly understood everywhere, that expansion of the 'state action' concept to include every form of state fostering, enforcement, and even toleration [of racial discrimination] does not have to mean that the fourteenth amendment is to regulate the genuinely private concerns of man."<sup>232</sup>

The Supreme Court Reporter recounts situations in which the Court has declined to find state action and left the individual without an effective remedy against the warehouseman who undertakes a private sale of goods entrusted to him for storage under a state's commercial code;<sup>233</sup> or against a public utility that cuts off electricity

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229. See generally William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U. L. REV. 558, 562 (1985) (expressing the concern that relaxing the state action doctrine will lead to a judicial narrowing of rights).

230. For a criticism of legislative efforts to apply specific constitutional rights in the private sphere on a categorical basis, see Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1600-32 (1998) (explaining process and orthodoxy concerns).

231. See Judith R. Blakeway, Note, *Constitutional Law—State Action—Private Club's Lease of Bay Bottom Land from City for Token Rental Constitutes State Action*, 54 TEX. L. REV. 641, 649 (1976) ("The state action limitation demarcates an area beyond which the constitutional restrictions of the fourteenth amendment do not control private individuals, who are allowed the personal autonomy to make private decisions.")

232. Black, *supra* note 4, at 100.

233. Compare *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978), with *Sharrock v. Dell Buick-Cadillac, Inc.*, 379 N.E.2d 1169, 1174 (N.Y. 1978) (declining to follow *Flagg Brothers* in part). "State Constitutions in general, and the New York Constitution, in particular, have long safeguarded any threat to individual liberties, irrespective of from what quarter that peril arose." *Id.*

service without notice;<sup>234</sup> or against a private nursing home that reduces a patient's level of care;<sup>235</sup> or against a shopping mall that bars individuals seeking to distribute information from the premises.<sup>236</sup> Moving forward, current disputes might focus on actions by private health management organizations, private defense contractors, and private dispute resolution companies that would violate constitutional norms if undertaken by the government. Imposing constitutional restrictions on corporate actors in these situations cannot meaningfully be said to implicate "the genuinely private concerns" of individuals in the sense of an autonomy interest that the Constitution is obliged to nurture in the private domain. Rather, they reflect situations in which the private use of concentrated, state-sanctioned economic power negatively affects important constitutional values and narrows the autonomous choices of individuals.<sup>237</sup>

This is not the occasion for making a full-blown argument about extending constitutional protection against corporate activity; moreover, not every injury inflicted by private economic power deserves a constitutional remedy. Whether a remedy is warranted requires a case-by-case decision in light of the relations and interests at stake—"a multitude of relationships might appear to some to fall within the Amendment's embrace," Justice Douglas explained in *Burton*, "but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present."<sup>238</sup> The practice of horizontality abroad assumes that constitutional norms will influence the resolution of private disputes in different ways and to varying degrees. That approach seems relevant in considering how best to revise the state action doctrine. Indeed, as Henry J. Friendly wisely observed in his famous lecture, "The Dartmouth College Case and the Public-

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234. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

235. See *Blum v. Yaretsky*, 457 U.S. 991 (1982).

236. See *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *But see* *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

237. See *Becker v. Philco Corp.*, 389 U.S. 979, 984 (Douglas, J., dissenting from the denial of certiorari) ("If the mature corporation is recognized to be part of the penumbra of the state, it will be more strongly in the service of social goals." (quoting JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 393-94 (1967))).

238. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961).

Private Penumbra”: “[if] the Supreme Court should take a liberating or even an obliterating view of what constitutes state action, whether because the Court likes that position or because it can find no logical stopping place, it does not follow that everything embraced within this expansive notion may be judged in the same way.”<sup>239</sup> Constitutional protection in any particular case should be afforded, as David Strauss has urged, with due regard for the “overall health” of the constitutional system and with attention to the negative effects that the challenged activity might exert on public values.<sup>240</sup> As to that goal, the American version of radiating effect—spooky doctrines that speak of penumbras and emanations—provides a strong analytic method for facilitating the migration of public values into the private sphere in a way that would nourish, and not subvert, individual autonomy.

#### CONCLUSION

Commentators often raise the banner of American exceptionalism to justify doctrinal differences that exist between American law and legal systems abroad.<sup>241</sup> To say that America is exceptional carries various connotations: that the nation is superior to, or isolated from, or simply different from other countries.<sup>242</sup> The observation that

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239. Henry J. Friendly, *The Dartmouth College Case and the Public-Private Penumbra*, 12 TEX. Q. 1, 18 (Supp. 1968).

240. Strauss, *supra* note 5, at 419 (making this argument in defense of aligning the constitutional duties of state and local government with those of private parties).

241. The term American exceptionalism is associated with Alexis de Tocqueville. See Mark B. Rotenberg, *America's Ambiguous Exceptionalism*, 3 U. ST. THOMAS L.J. 188, 189-91 (2005). Conversely, the idea itself is attributed to an indigenous source: John Winthrop's sermon of 1630. See Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 392 n.1 (2008). See generally Steven G. Calabresi, “A Shining City on a Hill”: *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1337 (2006) (“[A] positive account of the ways in which the United States truly is exceptional will call into question the practicality and wisdom of our Supreme Court imposing foreign ideas about law on us.”).

242. See Randy E. Barnett, *The Separation of People and State*, 32 HARV. J.L. & PUB. POL'Y 451, 451 (2009) (“The subject of American exceptionalism, about which much has been written, is extremely complex.”); see also Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1481 n.4 (2003)

American law is exceptional often is accompanied by reasons to explain why the exceptional American approach exists and why it persists.<sup>243</sup> Such discussions sometimes take on a normative edge: the existence of the exceptional position becomes grounds to support and to sustain the status quo.<sup>244</sup> Along the way, invocation of American exceptionalism ends up obscuring the complexity of American law, ignoring its plurality of approaches, and submerging unresolved conflicts within existing doctrine. This Article has attempted to draw attention to themes and motifs in American law that recast the exceptional nature of the American state action doctrine in a different light and that highlight analytic methods, internal to American law, that are available to repair a constitutional doctrine that seriously requires reform. That these approaches support a reworking of American doctrine does not compel or necessitate one, but their availability ought to disarm one major source of opposition to such a change.

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(explaining that the term American exceptionalism “has historically referred to the perception that the United States differs qualitatively from other developed nations, because of its unique origins, national credo, historical evolution, and distinctive political and religious institutions”).

243. See, e.g., Michelman, *supra* note 19, at 134-42 (identifying and seeking to explain the exceptional nature of the American state action doctrine).

244. See, e.g., Roger P. Alford, *Free Speech and the Case for Constitutional Exceptionalism*, 106 MICH. L. REV. 1071, 1088 (2008) (“Constitutional exceptionalism posits that where the exceptions refute the existence of a common constitutional rule, different answers to common questions are to be celebrated.”).