A Constitutional Confluence: American ‘State Action’ Law and the Application of South Africa’s Socioeconomic Rights Guarantees to Private Actors

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A CONSTITUTIONAL CONFLUENCE:
AMERICAN "STATE ACTION" LAW AND THE APPLICATION
OF SOUTH AFRICA'S SOCIOECONOMIC RIGHTS
GUARANTEES TO PRIVATE ACTORS

STEPHEN ELLMANN*

The final South African constitution\(^1\) widened the range of constitutional protection beyond the classic protection of negative liberties against the state in two very striking ways. First, it constitutionalized a range of socioeconomic rights that constitute positive liberties or claims against the state. Second, it made clear that the provisions of the Bill of Rights could apply not only vertically (protecting the individual against the state) but also — to continue the spatial metaphor — diagonally (protecting individuals against a variety of semi-private actors sufficiently linked to the state to count as part of it) and horizontally (controlling private actors' relations with each other). But how should courts decide when these rights do, or don't, apply?

I believe that as part of answering this question, South African courts should borrow from American jurisprudence addressing the question of when private actors are engaged in "state action" and hence subject to United States constitutional requirements. This argument may be surprising, because South Africa's explicit textual authorization of application of the Bill of Rights to private actors might seem to foreclose the need to look for connections between those actors and the state. Indeed, South Africa's Constitutional Court, in rejecting full horizontal application of the Bill of Rights under the interim constitu-

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1. Constitution of the Republic of South Africa, Act 108 of 1996. Particular sections of this constitution are cited hereafter simply by section number (for example, "s 24(b)").
tion, seemed to view U.S. state action law as enabling courts to do indirectly, "sometimes with great ingenuity," what South Africa's final constitution now allows them to do directly. As I hope to show, however, South Africa's constitution still reflects a view that state actors are more self-evidently subject to constitutional limits than private actors are, and it remains appropriate and useful to assess the "state-connectedness" of private actors as a part of determining whether they should be subject to constitutional obligations.

State action doctrine in the United States is elaborate, puzzling and — currently — quite restrictive. It has engaged scholars for at least sixty years. Happily, one of the scholars who turned his attention to this field is Dean Harry Wellington, whose 1961 essay, *The Constitution, The Labor Union, and "Governmental Action"*, incisively assessed both the doctrinal and the institutional issues involved in the potential extension of state action concepts to include the activities of labor unions. Dean Wellington's article, not surprisingly, remains illuminating today, not only for American law but also for understanding the potential course of South African constitutional development. It is a pleasure to be able to address this constitutional confluence as part of this symposium in honor of Harry Wellington, a leader of American legal education both as a scholar and also, at the Yale Law School and here at New York Law School, as a dean.

Attention to state action factors in South Africa would of course be quite unnecessary if the South African constitution simply and unambiguously applied all of its rights provisions to private actors. It is possible to interpret the two innovations cited above, in horizontality and in socioeconomic rights, to extend the reach of the constitution to a truly vast range of activity by private citizens. Individuals, like the state itself, might be found constitutionally responsible for providing others with such rights as free speech; free association; housing; health care, food, water and social security; a decent environment; and a basic education.

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The language of the relevant provisions, however, does not compel this reading. One reason to hesitate is that most of the socioeconomic rights sections are qualified, even as applied to the state itself, by constitutional recognition of the limited resources available to the state for realizing them. If private actors are bound by these provisions at all, there surely must be some similar limit on their obligations.

In addition, the application of these rights to private actors is governed by two provisions whose meaning is by no means self-evident. One is section 8(2), whose studied ambiguity provides that:

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

The other is section 239. Its definition of the “organs of state” to which the constitution applies potentially recharacterizes many semi-private actors as such state organs. This section’s language is simultaneously far-reaching and elusive, though certainly less elusive than 8(2). It provides that:

“organ of state” means –
(a) any department of state or administration in the national, provincial, or local sphere of government; or
(b) any other functionary or institution –
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

To explore the question of when the socioeconomic rights provisions (as well as other rights) do bind private persons, and what duties these provisions might actually impose, I will draw in part on the extensive United States jurisprudence dealing with the concept of “state action” – the requirement, in almost all cases arising under the United States constitution, that the challenged action be attributable to the

4. See ss 24(b), 26(2), 27(2), 29(1)(b).
government before it can be found subject to constitutional limits. It is not my purpose to urge that American state action doctrine be adopted without modification by South Africa’s courts; on the contrary, it is quite clear that South Africa’s framers have decided both to extend the reach of their constitution to cover more private conduct than the U.S. constitution encompasses, and to determine which private action to reach by applying criteria considerably different from those highlighted by state action doctrine. Nonetheless, American efforts to grapple with the state action issue do illuminate the issues facing South African courts, and provide some guidance towards their resolution.

How far private actors should be bound by the socioeconomic rights provisions depends, first, on the meaning of section 239’s definition of “organs of state,” since all organs of state are bound by the Bill of Rights under section 8(1). This definition is principally concerned, it seems, with identifying semi-private actors — “functionaries or institutions” who are performing “public functions.” One line of American state action law has focused on a very similar issue. American experience, I will urge, suggests that the potentially broad language of the section 239 definition should be read both to exclude many actors whose connection with the state is limited, and to include actors who wield state authority unlawfully — despite section 239’s specification that functionaries or institutions must act “in terms of” constitutional or statutory law.

For those actors who do not qualify as “organs of state,” section 8(2) provides the textual standard, directing attention to “the nature of the right and the nature of any duty imposed by the right.” American state action law has been sharply criticized for obscuring these very issues, and the South African constitution carefully avoids that peril. But the language of 8(2) is broad enough to encompass attention to the factors of state-connectedness that American state action law does highlight.

5. “Nearly all of the Constitution’s self-executing, and therefore judicially enforceable, guarantees of individual rights shield individuals only from government action.” Laurence H. Tribe, American Constitutional Law 1688 (2d ed.1988). The best known textual suggestion of the state action requirement appears in section 1 of the Fourteenth Amendment, the second sentence of which provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The Supreme Court read this sentence’s references to state conduct to reflect that the Amendment empowered the federal courts and Congress only to bar state misconduct and not to directly regulate private individuals’ behavior, in The Civil Rights Cases, 109 U.S. 3 (1883).
This attention should be paid. The application of the Bill of Rights to private actors is meant to constrain private abuse of power. This is a noble goal, but as we will see in some detail, it entails risks as well, both to the separation of powers between the branches of government and to the overall protection of individual rights. These risks should not be paralyzing, but they also should not be ignored. A focus on the connections between private actors and the state — in other words, a state action inquiry — will help South African courts to decide which cases are appropriate for full application of the constitution to private actors and which are not.

I. SECTION 239 AND THE CONCEPT OF "ORGANS OF STATE"

Before we ask when socioeconomic rights bind private actors, however, we must first decide when actors are actually private. We know from section 8(1) that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." The most ambiguous term here is "organs of state," and the definition of this term is supplied by section 239 (quoted above). As we will see, this language is easily broad enough to embrace many putatively private actors.6

Let us postpone for a moment examination of section 239(b)'s tantalizing reference to "any other functionary or institution," and examine first the meaning of 239(a)'s reference to "any department of state or administration in the national, provincial or local sphere of government." Does this definition include parastatals (quasi-private organizations that are infused with government control)? South African readers may be surprised to learn that United States constitutional law suggests the answer may well be "yes." The central case is a very recent one, Lebron v. National Railroad Passenger Corporation.7 In Lebron, 8 of

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6. Stuart Woolman has characterized the expansion in scope of this definition, as compared to the analogous provision of the interim constitution, as "stunning." Stuart Woolman, Application, in MATTHEW CHASKALSON ET AL., CONSTITUTIONAL LAW OF SOUTH AFRICA at 10-62 (Revision Service 5, 1999). Woolman also illuminatingly discusses the possible meanings of "organs of state," in the context of the interim constitution, id. at 10-35 to 10-39.

the 9 justices of the Supreme Court agreed that the National Railroad Passenger Corporation (more commonly known as Amtrak) was subject to the First Amendment’s protection of free speech — not because Amtrak was a private actor engaged in state action, but because Amtrak was actually itself a part of the state. To be sure, Amtrak was a corporation, but the Court held, in an opinion by Justice Scalia,

that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.8

As the Court said, “[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.”9 Even the fact that the statute creating Amtrak contained a “disclaimer of [government] agency status”10 did not alter the Court’s view; the question of whether an entity is part of the government for purposes of the constitution is a constitutional question, which statutes cannot answer.11 In short, in the United States — and surely in South Africa — adding some of the trappings of private status cannot render a government agency non-governmental.

Perhaps the next question is: if a parastatal is part of the government, does its privatization and sale remove it from the government for purposes of 239(a)? Here, surely, the answer is “maybe”. Governments can sell things just as private individuals can, and when the effect of the sale is to terminate entirely the government’s distinctive interest in the item sold, it seems fair to say that that item — even if the “item” is an entire corporate institution — is now simply no longer part of the government. (Its actions may still be subject to constitutional regulation on other grounds, however, including under section 239(b), to which we will turn in a moment.)

But not all sales are so complete. Suppose, for example, that the government retains some seats on the privatized entity’s board of directors, or that it provides the entity with subsidized electricity and guaranteed contracts. Whether or not these links would by themselves be sufficient to call for the application of constitutional limits, in the

8. Id. at 400.
9. Id. at 397.
10. Id. at 392.
11. Id. at 392-93.
context of a privatization of a previously public entity they might press for a conclusion that the supposedly privatized entity has never actually departed from the government's ambit. This conclusion might be especially persuasive if the alternative would be, as the Lebron court feared, to allow government to escape its most profound obligations under a veneer of privatization.

The United States Supreme Court confronted a problem of this sort in Evans v. Newton.\textsuperscript{12} That case addressed an effort by Macon, Georgia to disentangle itself from the operation of a park, which had been willed in trust to the city in 1911 for the use of whites only. Faced with the constitutional mandate of desegregation of public facilities after Brown v. Board of Education,\textsuperscript{13} Macon began operating the park on a desegregated basis, but suit was brought to challenge this desegregation as a breach of the will. "Thereafter the city resigned as trustee and .... [t]he Georgia court ... appointed three [private] individuals as new trustees ...."\textsuperscript{14} The Supreme Court somewhat half-heartedly assumed, arguendo, that a testator could have established an entirely private, and racially discriminatory, park. That did not conclude the case, however, because:

This park ... is in a different posture. For years it was an integral part of the City of Macon's activities. From the pleadings we assume it was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption .... The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of 'private' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility.\textsuperscript{15}

South African courts may well be similarly skeptical of government policies that appear to seek the evasion of constitutional obligations rather than legitimate governmental objectives.\textsuperscript{16}

\textsuperscript{12} 382 U.S. 296 (1966).
\textsuperscript{13} 347 U.S. 483 (1954).
\textsuperscript{14} Evans v. Newton, 382 U.S. at 298.
\textsuperscript{15} Id. at 301. The Court also suggested that because parks were intrinsically a public function, even private parties would not be allowed to segregate them. Id. at 301-02.
\textsuperscript{16} The U.S. Supreme Court's skepticism, however, had its limits. In a subsequent decision, the Court accepted as constitutional the Georgia courts' decision that since a public, discriminatory park was now unconstitutional, the trust established by the will
Now let us turn to 239(b), and its provision that organs of state can include "any other functionary or institution" performing certain functions. As a preliminary matter, the reference to "functionaries" here may serve in part to make clear that both "departments" and individuals employed within or by those departments constitute "organs of state." In United States law, "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."\(^\text{17}\) Moreover, as the Supreme Court indicated in \textit{West v. Atkins}, where it found that a prison physician was a state actor, it appears to make no difference whether the state's agent is "on the state payroll or is paid by contract," or is working full-time or part-time.\(^\text{18}\) The doctor in question had been employed by the state to meet its "constitutional obligation" to provide prison inmates with medical care.\(^\text{19}\) In these circumstances, to allow the form of the contractual or employment relationship to alter the reach of the constitution would, as the Court observed, leave the state "'free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to 'private' actors, when they have been denied.'"\(^\text{20}\) This logic strongly suggests that not only employees of South Africa's own government departments but also consultants hired by contract to assist in performing the state's constitutional duties should be viewed as organs of state while they perform in such capacities.\(^\text{21}\)

\(^{18}\) \textit{West v. Atkins}, 487 U.S. 42, 50 (1988). The phrase "under color of law" is a statutory one, but "[f]or most purposes, the inquiry whether challenged conduct is 'under color of law' within the meaning of 42 U.S.C. §1983 [the relevant statute] is the same as the inquiry whether the challenged conduct is 'state action.'" Tribe, \textit{supra} note 5, at 1703 n.2.
\(^{19}\) \textit{Id.} at 52 n.10, 54-55.
\(^{20}\) \textit{Id.} at 56 n.14, quoting the dissenting opinion in the court below, \textit{West v. Atkins}, 815 F.2d 993, 998 (4th Cir. 1987) (Winter, J., concurring in part and dissenting in part).
\(^{21}\) The Supreme Court has identified only one exception to the general rule that state employees are state actors, and that exception involves truly special circumstances, namely the work of a criminal defense lawyer paid by the state to represent indigents, "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding," \textit{Polk County v. Dodson}, 454 U.S. 312, 325 (1981). In that role, the lawyer is paid by the state "to act in a role independent of and in opposition to the state," \textit{West v. Atkins}, 487 U.S. at 50.

I do not mean to suggest, however, that every individual or entity under contract with the state is therefore essentially a state employee and an organ of state. Govern-
"[A]ny other functionary or institution," however, may also include entities not employed by the state (both juristic persons such as corporations, and individual people) who perform functions or exercise powers — call them "public functions," for short — in terms of the constitution or legislation. Indeed, a wide range of roles might be understood as public functions. United States decisions on state action have explored the contours of a "public function" argument, under which private actors in some circumstances are held to be state actors because of the task they are carrying out. The leading examples are a company town, a privately owned municipality which was held subject to the constitution's protection of free speech against state limitation,\textsuperscript{22} and the organizers of whites-only political primaries, who were held subject to the constitution's bar to racial discrimination by the state.\textsuperscript{23} The problem with this line of argument is that governments do a lot of things, and if every private actor who is engaged in action governments also engage in is therefore a state actor, the sphere of private action will be dramatically contracted. On this ground, essentially, current American doctrine suggests that for a public function argument to succeed, the function in question must be one that is traditionally and exclusively performed by governments.\textsuperscript{24}

But the United States constitution is not South Africa's, and the public function doctrine should not be as circumscribed in South Africa as it is in the United States. South Africa's constitution points toward a broader reading of "public function," by making the righting of injustices of private power, as well as of socioeconomic wrongs that are the result of both public and private acts, a constitutional duty of the state.\textsuperscript{25} If providing access to housing is a constitutional obligation of the state, after all, it is surely also a public function. More precisely, for here my shorthand term "public function" is imprecise, the provision

\textsuperscript{22} Marsh v. Alabama, 326 U.S. 501 (1946).
\textsuperscript{25} In addition to the socioeconomic rights provisions themselves, see ss 9(4) (mandating legislation barring private discrimination); 23 (guaranteeing the right to fair labor practices, and protecting trade union and employer rights); 25(5), (6) & (9) (mandating land reform); and 32 (1) & (2) (mandating legislation to enforce, inter alia, the right to information held by private actors).
of access to housing is surely a "function in terms of the Constitution," in the language of section 239(b)(i) — for with respect to constitutional functions the text implies either that all such functions are intrinsically public or that their public or private status is irrelevant to the recognition that those who perform them are organs of state.

In striking contrast, the United States constitution as currently read does not even oblige government to protect individuals from each other's violent attacks, much less to rectify conditions of private exploitation. Indeed, the United States constitution has at times been interpreted to affirmatively insulate some exercises of private power over others from governmental interference. Protecting employees' rights as against employers, for example, was at one time seen as a breach of "due process," a notion that required interpretive vigor to sustain. Much more plausibly, the rights of contracting parties against each other have received some protection under the clause of the constitution forbidding states from impairing the obligation of contracts.

It might be thought that a reading of "public function" in light of the socioeconomic duties which the South African constitution gives to the government would mean, for example, that every person building a house for low-income purchasers is an "organ of state" engaged in performing, in terms of the constitution, the function of providing access to adequate housing. This conception would virtually erase any distinction between private and public activity, however, and it should be looked at very critically on that ground alone.

I would suggest that the crucial limit on an expansive reading of section 239(b) with regard to socioeconomic rights should not be to deny that the provision of socioeconomic benefits is a public function — for clearly it is a public function when the state performs it, as it is constitutionally mandated to do — but rather to carefully define what it means to exercise a power or perform a function "in terms of" consti-

28. U.S. Const., art. I, §10, cl. 1 ("No State shall... pass any... Law impairing the Obligation of Contracts"). The leading modern case, dramatically limiting the force of this clause, is Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
29. We should be especially skeptical of dramatic expansions of the categories of seemingly private actors who constitute organs of state if, as Stuart Woolman has suggested, the Constitution may tend to be applied more stringently to those covered by this category than to other private actors whose private-ness is more marked and who therefore are subject to the Constitution (if at all) only via s 8(2). See Woolman, supra note 6, at 10-65.
tutional or legislative provisions.\textsuperscript{30} If "in terms of" means simply "as authorized by," then anyone engaged in the provision of socioeconomic goods in accordance with constitutional or statutory provisions will be an organ of state — again, a preposterous result, since vast spheres of conduct in modern societies must be carried out in accordance with law, and in particular statutory law.\textsuperscript{31} American state action doctrine has repeatedly recognized that the mere fact that the state has authorized some private conduct does not make that conduct attributable to the state itself.\textsuperscript{32} Especially because section 8(2) remains available to handle the question of the Bill of Rights' applicability to cases of less direct connection to the state, it seems appropriate to read "in terms of" strictly — to mean, essentially, that the actor is exercising a power granted quite specifically to him or her (or it) by the constitution or statute.\textsuperscript{33} General grants, on the other hand — say, a grant of

\textsuperscript{30} Both "public" and "function" do, however, deserve some interpretive attention. Lisa Thornton suggests that the word "public" was added to what became s 239(b)(ii) during the drafting process "to exclude, for example, companies registered in terms of the Companies Act." Lisa Thornton, \textit{The Constitutional Right to Just Administrative Action - Are Political Parties Bound?}, 15 S. Afr. J. on Hum. Rts. 351, 355 (1999). In some contexts, a proper understanding of "function" may be particularly important. The Bill of Rights protects the exercise of many human freedoms, and it might be possible to characterize parental care, for example (see s 28(1)(b)), or political organizing (see s 19(1)) as the performance of constitutional "functions," but we should not do so. The enjoyment of liberty should not be equated \textit{per se} with the performance of state functions — although some people (civil servants, for example) will choose to exercise their liberty by becoming, unmistakably, state functionaries.

\textsuperscript{31} As the late Justice Mahomed observed in \textit{Du Plessis v. De Klerk}, 1996 (3) S.A. 850, 894 (CC), there may today not be "any right which exists which is not ultimately sourced in some law."

\textsuperscript{32} \textit{See} \textit{Jackson v. Metropolitan Edison Co.}, 419 U.S. 345, 355-57 (1974); \textit{Wellington}, \textit{supra} note 3, at 352. At some points, however, and notably during the struggle against racial segregation and discrimination in the 1950s and 1960s, the Supreme Court did seem to approach the view that some authorizations of private conduct were unconstitutional state action. \textit{See} Kenneth L. Karst & Harold W. Horowitz, \textit{Reitman v. Mulkey: A Telophase of Substantive Equal Protection}, 1967 Sup. Ct. Rev. 39, 55-80. Today, mere permission will not suffice, but sufficient state "encouragement" will turn the encouraged private acts into state action. \textit{See} notes 123 - 126 infra and accompanying text.

\textsuperscript{33} An example would be the power of the Society of Advocates to seek court orders striking people from the advocates' roll, a power conferred by statute (though recognised at common law as well). \textit{See} \textit{De Freitas and Another v. Society of Advocates of Natal & Another}, 1998 (11) B.C.L.R. 1345 (CC). Another example might be some of the roles played by political parties in South Africa, as Thornton argues. \textit{See} Thornton, \textit{supra} note 30, at 355-56.

It is conceivable that unions' exercise of authority over their members could also be seen as an exercise of specifically granted power. The Supreme Court entertained a similar idea in the 1940s, in the face of unions' discrimination against African-Americans. Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 198 (1944). Dean Wel-
authority to use reasonable force to eject an unwelcome guest from one's home—would not convert everyone who used them into state actors.\textsuperscript{34}

How would this definition work? The builder of a single-family dwelling for a low-income buyer is engaged in doing something that the constitution welcomes, and in an area where the state is under constitutional responsibility, and so that builder might be found to be performing a public function. He or she would not, however, be performing that function in terms of the constitution, or in terms of the various pieces of legislation that no doubt specify various requirements for home building, because none of these sources of law should be regarded as granting the builder a power to build houses. These laws, after all, do not grant any power to this builder specifically. Rather, it seems more appropriate to view these legal provisions as regulating the builder’s exercise of a right, namely the right under section 22 of the constitution to engage in a trade, occupation or profession subject to regulation.\textsuperscript{35} Even if the builder actually could not work at all without some sort of builder’s license, I would urge that the grant of licenses whose primary function is simply to admit recipients to some lawful profession, rather than to charge them with some particular responsibilities within state programs, should not be viewed as satisfying section 239(b). Otherwise, everyone who does anything pursuant to a license—even, presumably, a driver’s license—could be regarded as an organ of state.\textsuperscript{36}

Lington’s conclusion was that other means were available for addressing unions’ pernicious use of race, and that therefore dislodging of state action principles for this purpose would be a mistake. Wellington, \textit{supra} note 3, at 372. Alternative means are available in South Africa as well, since s 8(2) of South Africa’s constitution permits the imposition of constitutional duties on unions, or any other actors, without the necessity of characterizing them as organs of state. But s 239(b) is also part of South Africa’s constitution, and there may be circumstances where unions’ roles deserve to be recognized as governmental.

\textsuperscript{34} It may initially seem odd that the more general the grant, the less “public” the power. But “the people” are not “the state.”

\textsuperscript{35} Exercise of constitutional rights is not, in itself, performance of a constitutional function. \textit{See note 30 supra.}

\textsuperscript{36} For an application of this reasoning to find that a private, racially discriminatory club which operated under, and with the aid of, a license authorizing it to sell liquor, was not thereby engaged in state action, see \textit{Moose Lodge No. 107 v. Irvis}, 407 U.S. 163 (1972). Similarly, a corporate charter ordinarily should not make its recipient a state actor, although at earlier stages in Anglo-American history corporations were evidently chartered one by one, for specific purposes, and thus might have been organs of state under the argument in the text. \textit{See Adolf A. Berle, Jr., \textit{Constitutional Limitations on Corporate Activity——Protection of Personal Rights from Invasion Through Economic Power}, 100 U. Pa. L. Rev. 933, 944-45 (1952). In the United States today, even quite specific
Suppose, however, that the builder acts under legislation that is directly concerned with overcoming South Africa’s chronic housing shortage. If, say, the builder constructs houses that do not comply with normal code requirements, and that are permitted only as part of a program of low-income housing construction created by statute, is the builder performing the public function of increasing access to housing, in terms of this legislation? This is surely a closer call, and even closer if the builder is receiving government funds to do the work. Even here, however, I would suggest that if the builder is simply one of many contractors engaged in this effort, it should probably not be treated as an organ of state. Such a builder might well be properly subject to constitutional limitations, but it will make more sense to explicitly address all the relevant considerations bearing on this choice, as section 8(2) invites the courts to do, than to shoehorn this builder into the awkward-fitting category of “organ of state.” But if, for example, a single builder or builders’ association contracts to implement a province’s low-income housing program, then it might well be appropriate to see that entity as having the kind of responsibility – and power – that qualify it as an organ of state.

I would also argue, however, that another possible limiting construction of section 239(b)’s “in terms of” requirement should be rejected. This argument would have it that no one acts “in terms of” law unless he or she acts in compliance with the law in question. This, indeed, was the interpretation given to similar language in the important 1980s case of Minister of Law and Order and Others v. Hurley and Another.37 The effect of that ruling, however, was to preserve the jurisdiction of the courts to review police misconduct. A similar ruling here would circumscribe the power of the courts to apply the constitution’s mandates, and would do so precisely in those cases where such application is likely to be most needed – where the actors in question are exceeding their constitutional or statutory authorization. In a related context, the United States Supreme Court ruled forty years ago that police officers’ conduct could be considered “under color of law” and subject to constitutional challenge even if the same conduct was actually in violation of the state laws under which the police were author-

ized to operate. That ruling preserved the force of the United States constitution's dictates, and a similar reading of section 239(b) would be equally appropriate.

II. SECTION 8(2) AND THE APPLICATION OF THE BILL OF RIGHTS TO ACTORS OUTSIDE THE STATE

A. The constitution's acceptance of horizontality

In Du Plessis v. De Klerk, the Constitutional Court ruled that the interim constitution did not provide for the direct application of the rights it guaranteed to the relations of private individuals in general. But the new constitution differs on this score from the one it replaced, in several significant respects. First, it eliminates the interim constitution's failure to include the judiciary among the institutions of government bound by the Bill of Rights – a feature of the earlier document that the Du Plessis v. De Klerk court emphasized. Second, it explicitly gives the Constitutional Court the authority to refashion rules of the common law, again, the Du Plessis v. De Klerk court had emphasized its lack of this power under the interim constitution, in denying that that constitution directly operated on rules of the common law as they

38. Monroe v. Pape, 365 U.S. 167, 172 (1961). Even Justice Frankfurter, the lone dissenter in this case, agreed that systematic violations of state law – as distinguished from isolated breaches which the states might be assumed to be able to address – would be under color of law. See id. at 236 (Frankfurter, J., dissenting). See also Home Tel. & Tel. v. Los Angeles, 227 U.S. 278, 289 (1913) (where a state officer violates the Fourteenth Amendment by acts "which there would not be opportunity to perform but for the possession of some state authority," the courts must "assum[e] that the officer possessed power" to act).

39. Cf. Skhosana and Others v. C D Roos T/A Roos Se Oord and Others, No. LCC50/99 (Land Claims Court, April 20, 1999), at ¶¶ 15, 18 (holding that "acting in terms of ESTA" [the Extension of Security of Tenure Act] means acting "within the sphere of law established by this Act"; this purposive interpretation appears to give the Land Claims Court “jurisdiction to review cases which fell to be dealt with in conformity with ESTA, but were not so dealt with").

40. See note 2 supra.


42. S 8(1); see Du Plessis v. De Klerk, 1996 (3) S.A. at 877 (judgment of Kentridge AJ). Three justices (Chaskalson P, O’Regan J and Langa J) concurred explicitly in Kentridge AJ’s judgment; three others (Ackermann J, Mokgoro J and Sachs J) separately expressed their general agreement with this judgment.

applied between private individuals.\textsuperscript{44} Third, the new constitution explicitly, or in some cases almost explicitly, makes certain rights applicable to private actors,\textsuperscript{45} and contains several other guarantees that either bind private actors or at least oblige the state to regulate private actors' behavior.\textsuperscript{46}

Fourth, and most obviously, the new constitution contains section 8. Section 8(2), as we have seen, states the circumstances in which rights bind private actors. Though it does not tell us which rights bind which actors, and instead says rights bind "if, and to the extent that," they are applicable, its phrasing seems more prescriptive than conditional. It does not say that "rights may apply" in certain circumstances, but rather that they do. Moreover, section 8(3) goes on to specify how courts are to develop the law "[w]hen applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2)"; again, the import of the phrasing is that there will actually be such cases. For these reasons, it does not seem correct to read the new Constitution as "simply defer[ring] the question of application";\textsuperscript{47} the text is, rather, an invitation to such application. What the invitation leaves very much to the courts, however, is the elaboration of the proper oc-

\textsuperscript{44} 1996 S.A. (3) at 880-81 (judgment of Kentridge AJ).

\textsuperscript{45} These include ss 9(4) (banning unfair discrimination by any person); 15(2) (authorizing religious services at state-aided — but presumably private — institutions, provided that they meet several requirements); 29(3) (prohibiting race discrimination even by private schools); 30 (protecting language and culture rights, but specifying that "no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights"); 31 (similarly protecting, but limiting, the rights of "cultural, religious and linguistic communities"); and 32(1)(b) (guaranteeing the right of access to information held by private persons). Two of these, ss 9(4) and 32(1)(b), are linked to provisions for legislative enforcement, but even if these accompanying provisions embody a preference for legislative rather than judicial enforcement — see Sprigman & Michael Osborne, HR-25 \textit{supra} note 43, at 38-40 — the other sections have no such legislative action provisions.

\textsuperscript{46} These include ss 12(1)(c) (guaranteeing the right "to be free from all forms of violence from either public or private sources"); 23 (labour relations, including rights to organize and engage in collective bargaining); 25 (6) & (7) (property rights guarantees to those who lost such rights "as a result of past racially discriminatory laws or practices"); 26(3) (protection against eviction); 27(3) (emergency medical treatment); and 28 (children's rights, including the rights to family care or parental care, and to protection from neglect or abuse). For identification and discussion of a number of the provisions cited in this note and note 45 \textit{supra}, see Halton Cheadle & Dennis Davis, \textit{The Application of the 1996 Constitution in the Private Sphere}, 13 \textit{So. Afr. J. on Hum. Rts.} 44, 59 (1997).

\textsuperscript{47} Sprigman & Osborne, \textit{supra} note 43, at 30.
casions for this horizontal application, and of the proper methods of carrying it out.

B. The risks of accepting the invitation to horizontality

1. The guidance of the constitutional text

It is important to recognize that the constitution's invitation to horizontality is not unhesitating. There is, after all, no doubt whatsoever under section 8(1) that the Bill of Rights applies to the government. In contrast, section 8(2) says that the Bill of Rights binds private actors "if, and to the extent that, it is applicable." One cannot read the words just quoted without drawing the inference that the Bill of Rights may sometimes not apply to private actors, or sometimes not apply to them to the same extent as it does to the state. Moreover, section 239 offers more evidence of the "state-centered" focus of the constitution. This section expands the boundaries of the state to encompass some entities not self-evidently governmental, but the private actors it characterizes as "organs of state" are clearly those with links to the state, in the form of public responsibilities assigned to them by constitutional or statutory provisions.

None of this is surprising. The South African constitution's Bill of Rights was written against a background of rights protection in other constitutions. What the South African scholar Alfred Cockrell has called the "orthodox view" has been that the special concern of constitutional rights was with protection of citizens against the state. The United States is, of course, one adherent of this view, with the permutations of our state action doctrine marking the extent to which we have departed from an exclusive focus on the conduct of the government. Canada's Supreme Court has ruled that the Canadian Charter does not apply to common law rules in litigation between private parties. Germany too has largely eschewed direct application of its Basic Law rights provisions to private actors, though it has embraced a pow-

48. Alfred Cockrell, Private Law and the Bill of Rights: A Threshold Issue of 'Horizontalit
49. For the Constitutional Court's account of the comparative constitutional jurisprudence of the United States, Ireland, Canada and Germany, see Du Plessis v. De Klerk, 1996 (3) SA at 871-75.
ful form of "indirect application." The "orthodox view" is shifting, and clearly the South African framers intended to depart from it.

51. Peter Quint explains the German practice in an illuminating article, Peter E. Quint, Free Speech and Private Law in German Constitutional Theory, 48 Md. L. Rev. 247 (1989). Quint writes that the German Constitutional Court held in the Luth case, 7 BVerfGE 198 (1958), that "the Basic Law establishes an 'objective ordering of values,'" Quint, supra, at 261. Quint continues:

Yet even though the Court acknowledged that the constitution must play a role in private law, it also made clear that constitutional rights do not ordinarily have the same impact in private law disputes as when those rights are asserted against the state in public law controversies. In reaching this conclusion the Court adopted what has come to be known as the doctrine of the 'indirect' effect of constitutional values on private legal relations....

In a public law action between an individual and the state, a constitutional right can directly override an otherwise applicable rule of public law. In private law disputes between individuals, in contrast, constitutional rights were said to 'influence' rules of civil law rather than actually to override them.... In such cases the rules of private law are to be interpreted and applied in light of the applicable constitutional norm, but it is nonetheless the civil law rules that are ultimately to be applied.

... The Court's 'indirect' theory therefore imposes an obligation on the lower courts to use their powers creatively to alter or adapt a rule of the civil law when a constitutional value is implicated. A substantial tension remains, however, between the force of the private law values and the influence of constitutional norms.

Id. at 262-64 (footnotes omitted). Remarkably, the doctrine of indirect application “may even lead, in some circumstances, to something that looks very much like the judicial creation of a constitutional tort action by one private person against another private person to redress a constitutional violation.” Id. at 275. At the same time, Germany's Constitutional Court approaches the review of the private law decisions of the ordinary courts with a considerable measure of deference. Id. at 319-29.

52. Germany, even though it has not generally endorsed direct application of constitutional rights provision to private actors, still represents a distinct shift from the American approach, since, in Peter Quint's words, “[t]he underlying German theory appears to reject the problematic view that it is possible to separate the public from the private realm. At very least, the German view is skeptical of the position that the fundamental law should apply only to the ‘public’ realm, even assuming that such a realm can be clearly delineated.” Id., at 340. Similarly, Canada rejected direct application of the constitution to private parties' disputes at common law in Dolphin Delivery, [1986] 2 S.C.R. 573, but Murray Hunt points out that the same case also approved “apply[ing] and develop[ing] the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution,” id. at 603, and suggests, in light of another case, “how paper-thin the distinction may be between ‘extending’ or ‘modifying’ the common law in order to make it comply with Charter values, which is permissible, and making ‘far-reaching changes’ to the common law, which is not.” Murray Hunt, The "Horizontal Effect" of the Human Rights Act, [1998] Pub. L. 423, 430, 432.

Other nations' approaches to the horizontality issue range from embrace to rejection, with uncertainty apparently one of the intermediate stops. In Ireland, Andrew Butler writes, "it seems clear that the constitutional guarantees of the Bunreacht [the

Countries that appear to accept some measure of constitutional influence on private law include: Belgium, see André Alen & Jan Clement, *Fundamental Rights and Liberties*, in *TREATISE ON BELGIAN CONSTITUTIONAL LAW* 187 ¶ 370 (André Alen ed. 1992) (noting statutory provision for damages for private violations of constitutional rights, and observing that "[t]he opinion gains more and more ground that there may be some kind of 'Drittwirkung' [the German term for horizontality] of fundamental rights in Belgium"); Costa Rica, see Rubén Hernández Valle, *Costa Rica*, in 2 *INTERNATIONAL ENCYCLOPEDIA OF LAW/CONSTITUTIONAL LAW* 105 ¶405 (2000) ("With regard to efficacy, the fundamental rights are binding not only on the public power, including legislators, but also on other citizens"); Estonia, see Raul Nerits & Kalle Merusk, *Estonia*, in 2 *INTERNATIONAL ENCYCLOPEDIA OF LAW/CONSTITUTIONAL LAW* 182 ¶ 240, 186 ¶ 246, 190 ¶ 249 (1998) (arguing that the Estonian constitution should be read to bind private individuals, directly or indirectly); Greece, see Philips C. Spriotopoulos, *Constitutional Law in Hellas* 128 ¶389 (1995) (Greek courts "waver between" recognizing application of constitutional rights to third parties and rejecting it); Japan, see Hiroyuki Hata & Go Nakagawa, *Constitutional Law of Japan* 109-10 (1997) (citing and endorsing Japanese cases of "indirect application" of constitutional rights to private disputes, while noting that certain Japanese constitutional provisions "apparently stipulate that they are directly applicable between private parties"); perhaps Malta, see Andrew Clapham, *Human Rights in the Private Sphere* 93 n.17 (1993) (Malta's European Convention Act 1987 contains "no limitation . . . restricting claims against private individuals"); Namibia, see Du Plessis v. De Klerk, 1996 (3) S.A. 850, 877 ¶ 45 (quoting *NAMIB. CONST.* art. 5: "The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed") (noted by Woolman, *supra* note 6, at 10-15 n.14); the Netherlands, see Constantijn J.M. Kortmann & Paul P.T. Bovend'eerdt, *Dutch Constitutional Law* 147 ¶ 358 (2000) ("[f]undamental rights only enter into the relationships between citizens indirectly, in interpreting open legal concepts such as the civil law concept of good faith," although "during the constitutional reform of 1983 . . . [t]he government asserted that fundamental rights could also operate between one citizen and another"); Romania, see Mihai Constantinescu & Victor Dan Zlătescu, *Romania*, in 4 *INTERNATIONAL ENCYCLOPEDIA OF LAWS/CONSTITUTIONAL LAW* 112 ¶ 293 (1996) (under Romania's constitutional provision for equality before the law, "citizens are equally treated . . . by both public authorities and any other subjects, whether natural or juridical persons"); and Spain, see *EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, BULLETIN* No. 3 at 444-45 (1999) (summarizing an unnamed 1999 decision of the Spanish Constitutional Court, Second Chamber, which held that an employer dismissing an employee for initiating legal proceedings against the employer violated the employee's constitutional right to "effective protection by the courts"); *EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, BULLETIN* No. 1 at 158-59 (2000) (summarizing Santiago Aldazabal Gómez v. Casino de La Toja, a 2000 decision of the Spanish Constitutional Court, First Chamber, which found that a casino company's installation of surveillance
equipment to monitor its employees potentially violated the employees' constitutional right to "personal privacy").

Perhaps most startlingly, the United Kingdom, which until recently did not have a Bill of Rights as such at all, now has enacted the Human Rights Act of 1998, which apparently is meant to provide at least some measure of horizontality. The Lord Chancellor stated during the Parliamentary consideration of this law that "[w]e . . . believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the [European Convention on Human Rights] not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals." Hunt, supra, at 440 (quoting 583 Parl. Deb., H.L., Nov. 24, 1997, col 783); but cf. Gareth Davies, The "Horizontal" Effects of the Human Rights Act, 150 New L.J. 899, 899 (2000) (maintaining that the Act's potential horizontal effect came about as "[p]erhaps accidentally, perhaps deliberately"). For further discussion of the extent of horizontal application of the United Kingdom's Human Rights Act of 1998, see Nicholas Bamforth, The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies, 58 Cambridge L.J. 159 (1999); Clive Walker & Russell L. Weaver, The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World, 33 U. Mich. J.L. Ref. 497, 540-41 (2001).

For an extended argument that the European Convention on Human Rights creates rights that apply to private actors - even though only States can be held liable for violations before the European Court of Human Rights - see Clapham, supra, at 178-244. The case Clapham calls "the strongest indication so far that the European Court of Human Rights will intervene and hold States responsible for violations of rights where the actor involved was a private individual," id. at 213-14, is X and Y v. The Netherlands, 8 Eur. Ct. H.R. (ser. A) at 235 (1985), in which the Court observed that Article 8 of the European Convention, which protects private and family life, may impose on states not only a duty "to abstain from . . . interference" but also "positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves." Id. at 239-40 ¶ 23.

Countries that appear to maintain a stricter insistence that the constitution applies only to state action include: Austria, see Kurt Heller, Outline of Austrian Constitutional Law 43 (1989) (noting that "the Austrian Constitutional Court has ruled that the purpose of the fundamental rights is the protection against the state and that a constitutional provision has no direct effect on third parties," and then observing that "[t]his ruling is highly disputed in the doctrine"); Hong Kong, see Hunt, supra, at 427 (citing a Hong Kong Court of Appeal ruling that Hong Kong's Bill of Rights Ordinance 1991 "has no application to a dispute between private individuals"); India, see Woolman, supra note 6, at 10-23 n.1; Shamdasani v. Central Bank of India, 39 A.I.R. (S.C.) 59 (1951) (finding that two constitutional provisions guaranteeing the right to property were not "intended to prevent wrongful individual acts or to provide protection against merely private conduct"); but cf. D.K. Agarwal, India, in 3 International Encyclopedia of Laws/Constitutional Law 52 ¶ 43 (1993) ("In its anxiousness to see that the State observes the sanctity of the fundamental rights, the Supreme Court has extended the definition of State . . . [to include] a public corporation or a government company or even a cooperative society"); New Zealand, see A.H. Angelo & Rosemary Gordon, New Zealand, in 4 International Encyclopedia of Laws/Constitutional Law 160 ¶ 390 (1997) ("It is questionable whether [New Zealand's Bill of Rights Act] extends beyond agents [of the state] to private parties"); and Zimbabwe, see Greg Linington, Zimbabwe,
to some extent. Equally clearly, the document they wrote still reflects that tradition. Application of the constitution to private entities still calls for special attention and special justification, pursuant to section 8(2).

If there were no good reason for the constitution’s hesitation, it would be tempting to disregard the text’s implications. In fact, however, there are two substantial considerations, each implicating constitutional values, that confirm the wisdom of carefully assessing the application of constitutional rights to bind private actors. These are the potential impact of horizontal application of the constitution for the separation of powers within the government and for private ordering outside it.

2. The impact on the separation of powers

Too ready an application of the Bill of Rights via section 8(2) could in effect alter the balance of lawmaking responsibility and power between the courts and Parliament.\(^5\) Suppose, for example, that all builders who contract with the government to build low-income housing are, without more, considered subject to the Bill of Rights under section 8(2). In that case, a host of questions about each builder’s conduct would become constitutional issues. Has the builder restricted employees’ freedom of speech, or denied their freedom to use the language they prefer? Does the worksite damage the environment? Are work rules a breach of employees’ privacy? Does negligence by the

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in 5 International Encyclopedia of Laws/Constitutional Law 240 § 572 (2000) ("To date Zimbabwean courts have always construed provisions in the Declaration of Rights in purely vertical terms.... The courts have not directly considered the question of whether any of the provisions in the Declaration apply horizontally as well").

In the context of the substantial movement towards horizontality elsewhere in the world, it is startling to read the recent decision of the Sixth Circuit in Chapman v. Higbee Co., 256 F.3d 416 (6th Cir.), vacated and rehearing en banc granted, 270 F.3d 297 (6th Cir. 2001). There the circuit court panel held, over a vigorous dissent, that a 1991 amendment to 42 U.S.C. § 1981 (1994), which declared that "[t]he rights protected by this section [1981] are protected against impairment by nongovernmental discrimination and impairment under color of law," 42 U.S.C. § 1981(c) (1994), had no application to the portion of 42 U.S.C. § 1981(a) (1994) which guaranteed to everyone in the United States "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." The panel maintained that "because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." Chapman, 256 F.3d at 421.

\(^5\) The separation of powers problem is thoughtfully explored by Chris Sprigman and Michael Osborne in their article, supra note 43, though I do not consider this problem as intractable as they do.
builder or the employees interfere with potential buyers' access to adequate housing?

These are all important questions, but they are also the sorts of questions that, in the absence of constitutional mandates, will be answered through the political process, in legislation, or through common law adjudication that is subject to legislative correction. If they are constitutional questions, however, then they may require judicial answers that determine the meaning of the constitution, and such answers will be beyond the reach of legislative override except by constitutional amendment.\(^{54}\)

One result may be the impairment of majority rule. In reasonably well-functioning democracies, with elected political officials and a judiciary structurally insulated from direct political influence, legislatures are the institutions designed to express the range of sentiments of the people. They may fail in this responsibility, but it is not likely that the judiciary will do better. On this ground, it has been argued that South Africa’s Bill of Rights should not be directly applied to private actors, since doing so will inevitably entail the weighing of one private actor’s rights against another’s, and “the enterprise of ranking rights requires a political choice, and political choice in a democracy is the terrain of

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\(^{54}\) South Africa’s Bill of Rights is easier to amend than its American counterpart, since amendment requires only approval by two-thirds of each house of Parliament, under s 74(2). The governing party, the African National Congress, holds slightly less than two-thirds of the seats in the principal house of Parliament, the National Assembly.

As in the United States, political leaders might also try to change constitutional law through appointments to the Constitutional Court. The members of this Court serve nonrenewable terms of no more than 15 years, pursuant to s 176 (1) (as amended in November 2001, see Carmel Rickard, *New Chief Justice by Month-end Parliament Passes New Bill*, *Sunday Times*, Nov. 4, 2001 (available at http://www.suntimes.co.za/business/legal/2001/11/04/carmel02.asp, visited Dec. 4, 2001)). The President must nominate most new members of the Court from lists of candidates submitted by a Judicial Services Commission, as prescribed by s 174 (4); the Commission includes both political appointees and a number of representatives of the judiciary and the legal profession, specified in s 178 (1).

In principle, it seems important to the growth of a strong constitutional order in South Africa that neither of these possible tools for overriding the decisions of the Constitutional Court be utilized often. The greater the constitutionalization of ordinary legal matters, however, the greater will be the temptation for the political branches to regain control of these issues by tactics such as these.
legislatures, not courts."  

I would not take these arguments so far. The constitution itself represents a political choice by the South African people, and arguably a more profound choice than those reflected in the day-to-day preferences of ordinary politics. South Africa's Constitutional Assembly chose to invite some measure of horizontal application of the Bill of Rights to private actors, even though each expansion of the sphere of constitutional adjudication limits legislative prerogatives. Similarly, the Constitutional Assembly chose to adopt a series of socioeconomic rights provisions, even though clearly these provisions risk limiting legislative choices. Unless these provisions are merely precatory, South Africa's courts have been charged with a responsibility, however perilous it may be. Indeed, to fail to undertake the application of the Bill of Rights that the constitution envisages would itself be an affront to democratic principles. None of this makes the argument from democracy disappear, for, as I have already mentioned, South Africa's framers by no means fully spelled out — either in connection with horizontality or in connection with socioeconomic rights — just how far they wanted courts to go in making choices that would countermand popular preferences. Rather, this discussion suggests that South African courts need to keep the argument from democracy in mind as a caution, while they proceed to develop the law in these areas.

A second potential result of constitutionalizing spheres of private activity may be damage to the quality of government decisionmaking. It is reasonable to believe that elected political officials are, in general, better equipped than courts to make complex policy judgments and compromises. American judges, applying a constitution that is strikingly brief, often remind each other that it is not their job or prerogative to be legislators. Although South Africa's constitution is a notably long document, its Bill of Rights still falls well short of a legislative code of rights. At a number of points, the drafters quite clearly sought to place substantial, if not primary, responsibility for working out the details of rights protection on the legislature — most plainly in connec-

55. Sprigman & Osborne, supra note 43, at 43.
56. Id. Section I's listing of founding values, in particular, falls well short of such a specification, because the values it embraces are so encompassing.
tion with private discrimination, \textsuperscript{58} land tenure, \textsuperscript{59} freedom of information, \textsuperscript{60} and just administrative action. \textsuperscript{61} The socioeconomic rights provisions obliging the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" \textsuperscript{62} of these rights also place responsibility and discretion in the legislature.

If, however, private actors are readily brought within the scope of constitutional guarantees, then the meaning of those guarantees will be more likely to be fleshed out by the courts. The potential impact on policymaking discretion may be most striking in connection with socioeconomic rights. If every builder of low-income housing were deemed subject to constitutional duties, would the courts have to spell out a code of minimally adequate housing, as part of ruling that a builder of less than minimally adequate housing was in breach of constitutional duties? \textsuperscript{63} Will the courts need to determine what percentage of a health care provider's time must be devoted to caring for indigent patients, as a measure of health care providers' duties under the right to access to health care? \textsuperscript{64}

\begin{itemize}
  \item \textsuperscript{58} S 9(4).
  \item \textsuperscript{59} S 25 (6), (7) & (9).
  \item \textsuperscript{60} S 32(2).
  \item \textsuperscript{61} S 33(3). \textbf{See also} s 15(3) (permitting legislation recognizing traditional or religious family law and marriages).
  \item \textsuperscript{62} \textbf{See} ss 26(2), 27(2); \textbf{cf.} ss 24(b), 29(b).
  \item \textsuperscript{63} In certain limited contexts, American courts have undertaken responsibility for the details of the provision of socioeconomic rights to particular groups of people, such as homeless people or involuntarily committed mentally disabled persons or prisoners. In the process, they have quite often found themselves promulgating very detailed codes of institutional conduct. \textbf{See}, e.g., Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), \textbf{aff'd in part, rev'd in part, and remanded by} Wyatt v. Aderholt, 503 F.2d 1305 (5\textsuperscript{th} Cir. 1974) (promulgating minimum standards for treatment of people involuntarily confined to state mental hospitals).
  \item \textsuperscript{64} Dean Wellington emphasized the difficulties that would face the Supreme Court if it modified state action doctrine to apply the First Amendment's protection of free speech to unions' use of unconsenting members' dues for political advocacy:
    \[ \text{This means the Court's immersion in the history, structure, and aspirations of the union movement, and of the particular union. In short, it means immersion in collective bargaining, and an understanding of the relationship between economic power and political action.} \]
    \[ \ldots \]

Thus the task of the court is complicated. And little can be gained from past judicial experience in determining the importance of any particular union-supported legislative program, and in balancing it with the impact of the union's action on the dissenting employee. Each case will
To be sure, there are routes by which the courts may mitigate this problem. If courts are not themselves ideal policymakers, they may be able to enlist others with greater expertise in the shaping of remedies. For example, they may largely entrust the choice of remedies to negotiations between the parties themselves. The parties, in turn, may look to experts; in a prison case, prisoner advocates and government counsel may both rely extensively on expert opinion from the field of prison administration as they negotiate comprehensive rules to resolve the prison's problems. In such negotiations, responsible government officials may actually acquire leverage enabling them to achieve reforms that the political process would not have produced unaided. Courts may also establish various forms of ongoing monitoring and supervision of the entities under constitutional scrutiny — court "monitors," for example, or special masters, or even receivers vested with complete control of the institutions in question. But these devices are by no means perfect, and the court orders they generate may be as subject to calcification and interest-group politics as any other form of lawmaking.

South Africa's constitution, however, provides a way for courts to mitigate both the infringement on majority rule and the impairment of policymaking that we have just been considering. The American scholar Henry Monaghan has called this method "constitutional com-

present the Court with a discrete problem. And even with respect to any one union the problem will change from time to time with shifts in union economic power — shifts caused by such factors as changed economic conditions or changed federal and state law. Furthermore, because unions are very different institutions indeed from States, municipalities or the federal government for that matter, it will be hard for the Court to transfer the wisdom contained in traditional first amendment decisions to its review of union conduct.

Wellington, supra note 3, at 364-66.

If the courts conclude that the relevant constitutional standard dictates a relatively bright-line rule rather than a contextual approach in a particular area, these difficulties may be dissipated. See, e.g., Abood v. Detroit Board of Education, 431 U.S. 209, 236 (1977) (holding that First Amendment bars laws authorizing public employee unions to require employees they represent to pay dues to support "ideological activities unrelated to collective bargaining").

65. For a discussion of the process of shaping judicial decrees addressing complex institutional problems, see Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARY. L. REV. 1281, 1298-1302 (1976).

66. For a recent critique of such judicial interventions, see Ross Sandler & David Schoenbrod, Government by Decree: The High Cost of Letting Judges Make Policy, CITY JOURNAL, Summer 1994, at 54.
mon law;"\textsuperscript{67} South Africans, borrowing from Germany, call it "indirect application" of the Constitution.\textsuperscript{68} By either name, this approach avoids the potentially undemocratic and inflexible character of constitutional adjudication by turning instead to development of the common law guided by constitutional values. The advantage, in the present context, is that rules of common law can presumably be overridden freely by legislation. That legislation in turn must be constitutional, like all other legislation, but the existence of the common law rules does not fix the constitutional minima, and so the legislature, at least in theory, would seem to retain just as much lawmaking flexibility after a judicial change in the common law as before. Ideally, such common-law decisionmaking by the courts, "in effect, opens a dialogue with Congress [or Parliament], but one in which the factor of inertia is now on the side of individual liberty," as measured in the courts' common-law decisions.\textsuperscript{69}

Although indirect application, or constitutional common law, has much to recommend it, it is not a complete solution to the separation of powers problems posed by the application of the bill of rights to private actors. This is so for two quite different reasons.

First, invoking the common law method cannot guarantee the preservation of legislative flexibility. This reality is reflected in a very recent U.S. Supreme Court case dealing with an effort by Congress to override the \textit{Miranda} rule (which requires police to give specific warnings to criminal suspects concerning their constitutional rights). When \textit{Miranda} was decided in 1966, the Supreme Court "opined that the Constitution would not preclude legislative solutions that differed from the prescribed \textit{Miranda} warnings but which were 'at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.'"\textsuperscript{70} Just two years later,\textsuperscript{71} Congress enacted legislation that would have made the absence of \textit{Miranda} warnings not an independent bar to the admission of a confession into evidence — as the \textit{Miranda} decision itself provided — but

\begin{itemize}
\item \textsuperscript{67} See generally Henry P. Monaghan, \textit{The Supreme Court — 1974 Term; Foreword: Constitutional Common Law}, 89 Harv. L. Rev. 1 (1975).
\item \textsuperscript{68} Two separate provisions of the Bill of Rights, ss 8(3) and 39(2), envision such development of the common law in light of constitutional values. Germany's "indirect application" is described in note 51 supra.
\item \textsuperscript{69} Monaghan, supra note 67, at 29.
\item \textsuperscript{70} Dickerson v. United States, 530 U.S. 428, 440 (2000), (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).
\item \textsuperscript{71} Dickerson v. United States, 530 U.S. at 435.
\end{itemize}
rather a factor to be considered in a broader inquiry into all the circumstances surrounding the overall voluntariness of the confession. The outcome of that inquiry, rather than the absence of Miranda warnings, would determine the confession's admissibility.\textsuperscript{72} Apparently because of doubts about its constitutionality, the statute was rarely utilized, and did not come before the Supreme Court until 2000.\textsuperscript{73} At that point, the Court did in fact find the attempted override unconstitutional, on the ground that Congress had simply reinstated a test for the admissibility of confessions (the "totality of the circumstances" test) that Miranda had held insufficient.\textsuperscript{74}

I welcome this result. Moreover, from the perspective of a constitution such as South Africa's, which explicitly authorizes constitutional common law, there is nothing in principle unacceptable about the process that led to this outcome.\textsuperscript{75} But this should still be a somewhat cautionary story. Congress attempted to override a decision that might have been overridable, but the executive branch chose not to press the matter. When the Supreme Court finally confronted the issue, it repulsed the effort to override its decision, in part on the ground that in the intervening years "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture."\textsuperscript{76} One reading of this series of events is that courts do not necessarily welcome legislative overrides.\textsuperscript{77}

If courts find such an interaction with the legislature uncomfortable, the quality of this interaction will be compromised. If Parliament

\textsuperscript{72} 18 U.S.C. 3501 (1994).
\textsuperscript{73} Nina Totenberg, \textit{Supreme Court Upholds 1966 Miranda Decision, All Things Considered, June 26, 2000} (transcript available on LEXIS).
\textsuperscript{74} Dickerson v. United States, 530 U.S. at 442-43.
\textsuperscript{75} Justice Scalia passionately argued in dissent, however, that the United States constitution does not authorize such decisionmaking. Dickerson v. United States, 530 U.S. at 457-61 (Scalia, J., dissenting).
\textsuperscript{76} Dickerson v. United States, 530 U.S. at 443.
\textsuperscript{77} Woolman argues that the dialogue between the branches will be encouraged by the judiciary's constitutional obligation "to accord the legislative and executive a certain amount of deference." Woolman, supra note 6, at 10-49. Andrew Butler similarly maintains that the Irish Supreme Court, operating without the constraint of a state action doctrine, "has been slow to intervene where either of the other two State organs [the administration or the legislature] or the common law provide sufficient protection and vindication for constitutional rights." Butler, supra note 52, at 32. But deference is not easy to guarantee. American courts also aver that federal statutes come before them with a presumption of constitutionality. Not every American court is an "activist" court, but a court skeptical of legislative actions can find grounds for overcoming such presumptions.
A CONSTITUTIONAL CONFLUENCE

Parliament may be particularly hesitant if the courts do not make clear which elements of their common law decisions they regard as constitutionally compelled — yet the magic of the common law is precisely that it does not necessarily require such precision. Moreover, a later court may see constitutional necessity in a decision which its authors considered discretionary. As a practical matter, therefore, the new, constitutionally-driven common law may well constrain legislative choices and affect judicial assessments of them.

The second difficulty is that, while constitutional common law may from this perspective be too intrusive on the political branches, from another perspective, paradoxically, it may not be intrusive enough. Suppose, for example, that a court were to conclude that the constitutional values reflected in section 27(1)(b) require that common law rules of water ownership and use be revised to give priority to the needs of thirsty people. The court might render this decision simply as a matter of common law adjudication under section 39(2), which calls on every court to “promote the spirit, purport and object of the Bill of Rights” in “developing the common law.” But violators of the new rules would then be guilty of breaching only the common law, rather than the constitution; at any rate, a court faithfully confining itself to applying the common law could not declare a violator to have acted unconstitutionally, for there would be no constitutional rule in place on the matter. If private violators of the constitution can sometimes be as great a threat to other men and women as state violators, however, then the deterrent, stigmatizing effects of the label “constitutional violator” should be available against them. To make those effects available, a court would need to declare a rule of constitutional, rather than merely common, law.

This observation presses us to look more closely at section 8(3). This provision, which has been called a “clawback” from full

79. Monaghan observes that “a busy Court may not, and in any event perhaps should not, regularly focus upon making such distinctions.” Id. at 31.
80. Section 27(1)(b) guarantees everyone “the right to have access to . . . sufficient food and water.”
horizontality,81 tells courts applying the Bill of Rights to private actors that they “must apply, or if necessary develop, the common law to the extent that legislation does not give effect to” right in question. Does this language mean that courts can only reshape the common law, and cannot also render a holding that the constitution requires this new common law rule (or some equally efficacious substitute that Parliament might later devise)? That reading would in effect reinstate much of the holding of Du Plessis v. De Klerk, since that case had no hesitation in authorizing precisely this kind of “indirect” application of the Bill of Rights to private actors by some courts (though not by the Constitutional Court itself).82 Moreover, it might seriously undercut the symbolic force of applications of section 8(2).

Section 8(3), however, need not be read this way. The proper reading is, I suggest, illuminated by contrasting it with section 39(2). Both of these provisions deal with development of the common law in light of constitutional values, and they might be thought to be redundant. What section 8(3) has, and section 39(2) does not, however, is the opening phrase: “[w]hen applying a provision of the Bill of Rights to a natural or juristic person in terms of [section 8(2)].” Section 8(3) addresses those cases in which the Bill of Rights is actually applied to private actors by virtue of section 8(2); section 39(2) addresses those other cases in which the Bill of Rights is not applied, but merely guiding. When the Bill of Rights applies, courts can properly declare what it means in the case at issue. Not every “application” requires such a definitive ruling,83 but some applications do, and section 8(3) makes room for them.84

81. Cockrell, supra note 48, at 3A-14. Woolman, supra note 6, at 10-60, adds that this language was inserted only at the end (“the last dog days”) of the negotiating process.

82. Du Plessis v. De Klerk, 1996 (3) S.A. at 885; see note 44 supra and accompanying text.

83. There may be some linguistic tension in the idea of courts “applying” the Bill of Rights without actually saying, each and every time, what the rights guarantees require. If this is a looser form of “application” than we might normally expect, however, I believe the flexibility this reading gives in the development of these new areas of constitutional law justifies adopting it. In any event, the term “apply” has considerable play in its joints, as the phrase “indirect application” reflects.

84. I am sympathetic to Stuart Woolman’s view that the power to develop the common law under s 8(3) includes the power to create new causes of action, “constitutional torts,” based directly on constitutional provisions. See Woolman, supra note 6, at 10-52. But the argument in text does not go this far; it requires only that the courts be able to
It is worth pausing to recapitulate the implications of this reading of sections 8(3) and 39(2). First, there are no legal questions left in South Africa to which the Bill of Rights is simply and inherently irrelevant. Section 39(2) makes clear that courts are obliged to promote constitutional values "[w]hen interpreting any legislation, and when developing the common law or customary law." Sections 8(3) and 39(2) together imply, however, that there are indeed some cases to which the Bill of Rights does not apply, while there are others where it applies and imposes binding obligations. Finally, my reading of section 8(3) is that when courts do find the Bill of Rights applicable, they may develop the common law (or interpret statutes) in the spirit of the constitution without determining the exact requirements of the constitution as such, but they also may — and sometimes should — render judgments that explicitly articulate constitutional rules.\footnote{There is no way to predict with any certainty how likely the Constitutional Court will be to make explicit constitutional rulings about the duties of private actors or instead to develop the common law without definitive constitutional determinations. In one recent case, however, the Constitutional Court has concluded that the common law governing administrative action is so infused with constitutional content that many, perhaps all, breaches of common law rules of administrative action are also unconstitutional. Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others, 2000 (2) S.A. 674, 696-98 (CC). The court emphasizes that "administrative law, which forms the core of public law, occupies a special place in our jurisprudence," id. at 696, but it is worth noting that a similar ruling in the context of the duties of private actors could constitutionalize large reaches of the common law. Whatever its impact on the separation of powers between the courts and Parliament, one important effect of constitutionalizing fields of the common law may be to cement the authority of the Constitutional Court — whose jurisdiction is confined to "constitutional matters, and issues connected with decisions on constitutional matters," s 167(3)(b) — to review the decisions of the lower South African courts on a wider range of issues. South Africa’s post-apartheid constitutions largely carried over the judicial system of the old order, while creating a new Constitutional Court; the greater the authority of the Constitutional Court, the greater its ability to insure that the judiciary as a whole is a part of the remaking of the nation. (I am indebted to Iain Currie for his exegesis of the Pharmaceutical Manufacturers case, in a presentation to the South Africa Reading Group, co-sponsored by New York Law School and the City University of New York School of Law, in May 2001.)}
and of democratic values. The obligation should of course be honored. The constitution itself reflects a democratic choice to constitutionalize and thus "judicialize" a wide range of rights claims. It also significantly mitigates the dangers of this choice by relying heavily on common law adjudication as the vehicle for some of the new rights jurisprudence. Still, there will be times when courts are called upon to speak in binding, constitutional terms and there may well be other times when less weighty expressions of judicial preference still dampen legislative innovation. Recognition of the risks of such actions counsels in favor of caution.

Before considering whether "state action" doctrine can further mitigate these problems, we must assay another possible peril.

3. The impact on private ordering

An undue extension of the applicability of the constitution may also affect the extent of individual liberty. To take an example currently at issue in the United States, the imposition of nondiscrimination requirements inevitably limits the freedom of association, or perhaps more precisely the corollary freedom of non-association.

86. In the United States, the reach of the constitution also affects another central question of power—the division between national authority and state authority, and especially the determination of the power of the federal judiciary vis-à-vis the state governments. See, e.g., Kevin L. Cole, Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine, 24 GA. L. REV. 327, 358-62 (1990); William W. Van Alstyne & Kenneth L. Karst, State Action, 14 STAN. L. REV. 3, 8, 14-22, 30, 34-36, 41-44, 49-50, 56-57 (1961). (Since Congress has authority to legislate in many spheres of life having nothing to do with state action, this doctrine no longer sharply constrains federal legislative power, as it did when other bases of federal legislative authority were more circumscribed. Louis Michael Seidman, The State Action Paradox, 10 CONST. COMM. 379, 396 (1993). To the extent that we are now entering another period of "federalist" limitations on national legislative authority, however, the state action doctrine may again meaningfully limit Congress as well as the federal courts.) It seems reasonable to predict that the constitutionalization of a wider sphere of South African life will similarly enhance national judicial power as against provincial political authority. It remains to be seen, however, whether provincial authority will in general provide either effective governance or meaningful checks on centralized power in South Africa, and so it is not yet clear how significant a consideration the potential impact on provincial power from the extension of the constitution's reach to private actors will actually be.

When is a person's choice of dinner guests, or friends, or club members, or business associates, to be considered unfair discrimination under section 9(4) rather than free association under section 18? South Africa appears to have committed itself to resolving these questions as conflicts between competing constitutional rights. But every additional constitutional right that is applied to private actors will bring with it a similar set of dilemmas. It seems clear that the drafters anticipated this problem, since they provided in section 8(3)(b) that the courts have the authority to "develop rules of the common law to limit" constitutional rights—but the fact that the problem can be tackled does not make it an easy one.

Acute as these problems may be when the rights in question involve issues such as discrimination, free association, free speech or religious liberty, it might be thought that socioeconomic rights claims will not present the same difficulties. There is no distinctive, countervailing liberty associated with housing, it might be said, nor with the provision of health care services or parental care or environmental conservation or trade union rights. I am inclined to agree that the most acute conflicts of rights tend to arise in noneconomic spheres, but to say that there are no distinctive liberties at play in the areas of socioeconomic rights is clearly wrong. Some physicians may be unwilling to perform abortions; are they therefore breaching section 27(1)(a)'s requirement of access to "health care services, including reproductive health care"? Some parents may approve of corporal punishment, while others oppose its use; would either set of parents be failing to provide their children with "parental care" under section 28(1)(b), or failing to protect their children from "maltreatment, neglect, abuse or degradation" under section 28(1)(d)? Would employers who encouraged workers to participate in joint labor-management

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88. Since s 9(4) mandates the adoption of anti-discrimination legislation, it is possible that these issues will be seen as conflicts between a constitutional right of free association and a statutory demand for non-discrimination, rather than as the intersection of competing constitutional rights. But this anti-discrimination legislation will be measured against the direct prohibition of private discrimination contained in the first sentence of 9(4). It seems fair to say that the legislation's requirements will rightly be viewed as effecting constitutional commands, and that cases of this sort will correspondingly be seen as involving, at least, constitutional concerns on both sides.

89. In this context, the "socio-economic" right to "parental care" overlaps with the somewhat more traditional negative liberty of freedom "from all forms of violence from either public or private sources," s 12(1)(c). The Constitutional Court recently raised, and explicitly left open, the question of whether the latter right required the development of the common law under s 8(3) "so as further to regulate or even prohibit caning
discussion groups be undercutting the trade union representing those workers, and thus violating workers' or unions' rights under section 23? Would unemployed villagers' killing of protected animals for food breach section 24's environmental guarantees, even if those villagers had traditionally hunted the animals in question? Would a building contractor's sale of title to new houses (in furtherance of section 26(1)'s guarantee of access to adequate housing) to the individual wives in a polygamous marriage undercut the structure of that marriage, in violation of the right to traditional marriage and family law protected by section 15(3)?

My point here is not that there are inalienable liberties at stake in each of these contexts that should be beyond all governmental power. Some or many of the choices suggested by the questions in the previous paragraph might rightly be put off limits, either by legislatures or by courts. Moreover, if private acts that injure others are not forbidden, then those who are injured by them will suffer a blow to their rights and freedoms.90

Nevertheless, the constitutionalizing of a wide range of interactions between citizens does present potential threats to private ordering. At the very least, the interference with legislative and political decisionmaking, discussed above as a separation of powers issue, will have an impact on how conflicting claims of human liberty are resolved. Presumably courts will be readier than legislatures to impinge on majority wishes for the sake of minority claims. Presumably courts will also be more inclined than legislatures to make decisions that precisely reflect logic and principle, rather than compromise and pragmatic adjustment. Presumably courts will feel more obliged to resolve claims brought before them, rather than – as legislatures might – to postpone definitive action of any kind in favor of studies or simply silence. And perhaps courts will be more inclined to move in these directions on the strength of constitutional mandates or principles than they would be if their duty was only to resolve the same cases in light of general principles of the common law. Thoroughgoing judicial application of the constitution to private actors in this fashion will surely produce some benefits, but it may also exact real costs.

There are other conceivable dangers to liberty as well. The choices courts will have to make between private actors' conflicting claims of right may be difficult ones for several reasons. As an initial matter, the weighing of such claims in constitutional terms is still, in South Africa and probably many other constitutional states, a relatively unfamiliar judicial enterprise. In addition, each party to the dispute, after all, may have a real — that is, a somewhat compelling — constitutional interest at stake. Moreover, the constitution itself, as already noted, by no means specifies how to rank all the conflicting claims. It is quite possible that courts called upon to resolve conflicting claims of private constitutional rights may be less vigilant in defense of some of these rights than they would be if they encountered them only in contests between individuals and the state.

Another possible result is that courts will feel a momentum for consistency in articulating the corresponding duties of public and private actors. If state social workers are forbidden to use corporal punishment, so may parents be; if state hospitals are required to provide abortions, so might all obstetricians, or at least all obstetricians who are the sole providers in their towns; if the state must protect endangered species, so must each village's people. Ironically, the momentum for consistency might also have the opposite effect: if private actors, subject to constitutional duties, are permitted to engage in a given form of conduct, then perhaps the state will be granted similar leeway.

Overuse of the Bill of Rights might also have troubling, broader implications for rights protection. The American scholar William Marshall has suggested that "[c]haracterizing every shouting match or every decision with whom to associate as actions that may lead to constitutional liability is to 'trivialize' the meaning of constitutional protection and thereby to weaken the force of a claim of 'true' constitutional protection in conflicts between the state and a private actor, by contrast, the state presumably will not ordinarily be able to invoke constitutional rights on its side of the balance, though it may well be able to assert important governmental interests recognized by the constitution. For the possibility that the state may have "rights" under South Africa's constitution, however, see Cockrell, supra note 48, at 3A-13 n.3.

91. See William P. Marshall, Diluting Constitutional Rights: Rethinking 'Rethinking State Action', 80 Nw. U. L. Rev. 558, 561-62 (1985). In conflicts between the state and a private actor, by contrast, the state presumably will not ordinarily be able to invoke constitutional rights on its side of the balance, though it may well be able to assert important governmental interests recognized by the constitution. For the possibility that the state may have "rights" under South Africa's constitution, however, see Cockrell, supra note 48, at 3A-13 n.3.

92. Peter Quint reports that Germany's "indirect application" of constitutional values has resulted in claims of free speech sometimes being denied when they clash with claims of injury to constitutionally-protected human dignity. Quint, supra note 51, at 290-302, 314-18, 344-45.

violation by overexposure."\textsuperscript{94} He worries too that if the Constitution comes to be seen by many people as a constraint on them rather than a protection, then it may lose its claim on popular adherence as "the protector of liberty."\textsuperscript{95}

These concerns deserve consideration, because we simply do not know yet what the effect of a full-scale application of the Bill of Rights to private actors will be. As with the separation of powers problems discussed above, however, I do not suggest that the rights protection issues laid out here call for courts to reject the invitation for horizontal application in section 8(2). If constitutional rights can be overused, then they should be used less. If they can be applied too rigidly, then they should be applied in more supple fashion. But when constitutional rulings are needed and wise, they should be made. These guidelines are of course much easier to state than to apply, but section 8(3)’s authorization — as I have read it — of both constitutional declarations and common law decisionmaking provides the vehicle for making the necessary discriminations. Where firm rights protection is called for, constitutional declarations should be made; where greater caution or case-by-case reflection is needed, courts can engage in common law decisionmaking that reflects constitutional values but does not impose constitutional edicts. What we need to consider now is how the courts are to determine when section 8(2)’s invitation should be accepted.

\textbf{C. "The nature of the right and the nature of any duty imposed by the right"}

Let us consider the case of pharmaceutical companies that manufacture drugs used for the treatment of AIDS. The provision of these drugs to patients by the government is unquestionably a part of making health care services available to everyone, as section 27(1) (a) mandates, and so it seems reasonable to say that the companies producing the drugs are in this respect participating in, or at least decisively affecting, the performance of a public function.\textsuperscript{96} No doubt they do so under a variety of regulatory provisions embodied in or derived from legislation, and with the aid of patent rights secured by domestic and international law. Nevertheless, the import of the discussion of section

\textsuperscript{94} Id. at 569.
\textsuperscript{95} Id. at 569-70.
\textsuperscript{96} On the meaning of "public function," see notes 30-34 and accompanying text \textit{supra}. 
earlier in this article is that these various links to the state probably do not by themselves transform the drug companies' production of anti-AIDS drugs into a public function conducted in terms of this legislation. (I do not mean to say that these links to the state are irrelevant, however; we will return to their significance below.) We therefore now face the question posed by section 8(2), of whether the right to access to health care should bind the pharmaceutical companies, "taking into account the nature of the right and the nature of any duty imposed by the right."

It is appropriate to begin with the most direct meanings of this language. In certain respects the nature of the duties imposed by the various provisions of the Bill of Rights makes it quite clear that some do, and some do not, apply to private actors. Section 27(2), for example, calls on "[t]he state" to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." Only the state, whose boundaries we have examined in connection with section 239, is charged with taking these steps. On the other hand, section 27(3), which provides that "[n]o one may be refused emergency medical treatment," seems readily applicable to each and every physician, whether publicly or privately employed, who is available to provide emergency medical treatment and refuses to do so.

The pharmaceutical companies' pricing of their drugs, however, does not seem to raise issues under either section 27(2) or section 27(3). The companies are not part of the state, as section 27(2) would require; and AIDS medications, vital as they are, in general are treatments of a chronic condition and hence not, under the Soobramoney decision, emergency medical treatment. If, then, any claim against

97. Section 26(2) is equally clearly focused on the state's role in providing access to housing. Section 29(1)(b) also focuses on the state's duty, although the right to further education beyond the "basic" level is not specifically stated to bind only the state. Section 24(b)'s focus is somewhat less clear; this provision entitles everyone to the right "to have the environment protected... through reasonable legislative and other measures," and "other" measures in principle could be taken by actors besides governments.

98. As we have already seen, a number of Bill of Rights provisions are directed to private actors or at the least oblige the state to regulate private actors' behavior. See notes 45 & 46 supra.

99. Soobramoney v. Minister of Health, KwaZulu-Natal, 1998 (1) S.A. 765, 772-75 ¶¶ 13-24 (CC). The provision of anti-AIDS medication to pregnant HIV-positive mothers in order to prevent the infection of their children, however, might well constitute an emergency matter. Sadly, however, it is possible that babies protected this way
the companies would have to rest on section 27(1)’s right of access to health care, we need to ask, first, whether that right has any enforceable content at all, and, second, whether — if it is enforceable at all — it is enforceable against private, non-governmental actors.100

It might be argued that the right to access to health care imposes no enforceable duties at all, but amounts only to an aspiration whose concrete realization depends on the largely discretionary decisions of legislatures as they seek, pursuant to section 27(2), “to achieve the progressive realisation of . . . these rights.” This seems mistaken, however. Even if it is very difficult for courts to regulate the long process of expanding access to expensive rights in a largely poor country, it seems somewhat easier for courts to identify denials of access and to say, for example, that section 27(1) imposes a duty not to deny such access.101

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100. Section 27 also guarantees “the right to have access” to food, water and social security. Similarly, section 26 guarantees “the right to have access to adequate housing.” Certain other broad socioeconomic rights are more firmly phrased, without the possibly limiting word “access”: the right to a basic education (29(1)); children’s rights, in particular to “basic nutrition, shelter, basic health care services and social services” (28(1)(c)); and the right “to an environment that is not harmful to . . . health or well-being” (24(a)).

101. Pierre de Vos reaches this conclusion on the ground that the state’s obligation under section 7(2) to “respect” all rights in the Bill of Rights “guarantees every person the right not to have her or his access to housing, health care, sufficient food and water, social security and the right to basic education subjected to unjustified interference.” Pierre de Vos, Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa’s 1996 Constitution, 13 So. Afr. J. Hum. Rts. 67, 80 (1997). Sandra Liebenberg also emphasizes the state’s duty to respect, and therefore not to deny access to, rights in her essay, Identifying Violations of Socio-Economic Rights Under the South African Constitution — The Role of the South African Human Rights Commission, in The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law 405, 411-12 (Penelope Andrews & Stephen Ellmann eds. 2001). Frank Michelman has also urged that an infringement on the right of access can be something “other than a failure . . . to take ‘measures to achieve realisation’ of the ‘access’ in question for ‘everyone.’” Frank Michelman, The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik, 14 So. Afr. J. Hum. Rts. 499, 504 (1998).

More authoritatively than any of these, the Constitutional Court has recently declared, in a case dealing with the right of access to housing under s 26, that “[a]lthough
To be sure, even defining denials of access is not simple, since every failure to treat is a denial of a sort, yet no provider can treat everyone, or provide unlimited services without somehow receiving revenue in return.

But this problem is not altogether intractable. We might define one form of unconstitutional denial of access as action that prevents the provision of health services and that does not rest on an acceptable justification in terms of the actor’s other rights and responsibilities. Arbitrary cut-offs of social security payments to some recipients, in order to keep total expenditures within allocated limits, might well be a denial of access to social security under this standard. And it is particularly easy to see that poor South Africans are currently being denied the subsection [26(1): “Everyone has the right to have access to adequate housing.”] does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.” Government of the Republic of South Africa and Others v. Grootboom and Others, 2001 (1) S.A. 46, 66 ¶ 34 (CC). The Court here endorses not only the existence of a protection against denial of this right, but also the application of this protection to private actors, although the reference to private actors is dictum.

The Grootboom Court went on to examine the positive obligations of the state. In elaborating the meaning of section 26(2)’s requirement that the state “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right,” the Court declared that “[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.” Id. at 69 ¶ 44. Because the state’s housing programs, albeit a “major achievement,” id. at 76 ¶ 53, had left “out of account the immediate amelioration of the circumstances of those in crisis,” id. at 78 ¶ 64, so that “people in desperate need are left without any form of assistance with no end in sight,” id. at 79 ¶ 65, the Court concluded that these programs violated s 26(2). Id. at 79-80 ¶ 69. This is a major step forward in the jurisprudence of socio-economic rights. Because the duty to “take reasonable legislative and other measures” explicitly applies to the state, however, it remains important to consider the dimensions of the distinct duty, potentially applicable to private as well as public actors, not to “deny” this right.

102. See Liebenberg, supra note 101, at 411. Similarly, a decision to use water from a private reservoir for cattle instead of for essential human uses during a drought would be a denial of access to water, in violation of section 27(1)(b). (Michelman asks whether a “common-law controversy over whether a particular water source is to be tapped for industrial use or rather left for domestic consumption by those who lack a good alternative supply of water” might be a case for the application of socioeconomic rights to private actors. Michelman, supra note 101, at 504.) So, too, a general hospital’s decision not to provide inoculations against childhood diseases, while continuing to offer elective plastic surgery, might well be a denial of access to health care. In each of these cases, the actor’s needs would not be sufficient to justify the kind of deprivation imposed.
nied meaningful access to anti-AIDS medication because they cannot pay the prices that the manufacturers charge. Judge Edwin Cameron recently spelled this out, when he attacked "the iniquity of drug availability and access in Africa" at the Durban AIDS conference in July, 2000, and declared that "[a]midst the poverty of Africa, I stand before you because I am able to purchase health and vigour. I am here because I can afford to pay for life itself." 103 Although drug prices have been reduced since then, 104 the vast majority of South Africans infected with HIV still are unable to afford AIDS medications. 105

Unless this denial can be justified in terms of the pharmaceutical companies' legitimate interests, it is unconstitutional — assuming that the pharmaceutical companies are bound by section 27(1) in the first place. Whether the companies' plausible interests in earning reasonable returns on their medical research justify the prices they had been charging until earlier this year — or the much lower prices they are now offering in poor countries 106 — is a question that ultimately might have to be litigated to be settled. Whether a court could fashion an order sensibly determining the extent of the price reductions that might be required would also be a difficult issue. 107 If, however, it proves feasible for the companies to further significantly reduce their prices, without compromising their financial stability, then refusing to make such reductions would be unconstitutional. 108

103. Judge Cameron is quoted in Andre Picard, Denial of AIDS drugs to poor called immoral; Treatment must become cheaper, more available, conference told, THE GLOBE AND MAIL (July 11, 2000) (available on LEXIS).

104. See note 115 infra.


106. See note 115 infra.

107. It must be acknowledged that determining the proper remedy in such a case would not be easy. Courts might need to decide how much drug prices would have to be reduced, and how to take into account such factors as patient need, company finances, and the various price reductions and donations of free medication that the companies are already engaging in. Difficult as this might be, however, I would not presume it is impossible, and courts might utilize for this purpose the remedy-framing processes discussed earlier in this essay. See text at notes 65-66 supra.

108. If the impact of the price reductions necessary to make AIDS drugs available to the citizens of poor countries — as much as 95% reductions, according to a recent study by the Panos Institute, Picard, supra note 103 — would compromise the companies' financial stability, then under my analysis the companies' refusal to reduce their prices would not be an unconstitutional denial of access. In that case what Judge Cameron calls the "moral emergency" posed by this issue, id., would have to be met by govern-
But are the drug companies bound by the access provision in the first place? In light of the Constitutional Court's decision in *Grootboom,* it now seems clear that section 27(2) — which directs the state to take reasonable legislative and other measures to achieve each of the access rights in section 27(1), including the right to access to health care services — does not preclude application of 27(1)'s requirements to private actors. Section 27(2) tells us part of what the state must do to implement these rights; it does not tell us that only the state need do anything. If there is no textual bar, then let us turn to the other portion of the inquiry specified by 8(2) itself, the examination of "the nature of the right" — that is, the AIDS victims' right — at stake.

The more compelling the right, presumably, the more reasonable it is that the right should be found applicable to private actors. Just as South Africa has explicitly made private discrimination a breach of the

109. If private companies do not have a duty to lower prices under section 27(1), it may be that no one has this duty. The government of course could purchase drugs and then distribute them free or at lower cost, but this is precisely the sort of disposition of the government's "available resources" that section 27(2) appears to leave largely — though not entirely, see note 101 supra — in the discretion of the government.


111. See note 101 supra.
constitution,\textsuperscript{112} no doubt out of a recognition of the outrageousness of this form of injustice and its centrality in South African history, so it is reasonable to see section 8(2) as aimed, in part, at barring private actors from other, comparably egregious breaches of human rights. For similar reasons, perhaps, the Thirteenth Amendment of the United States constitution bans slavery, and is “not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”\textsuperscript{113} And while United States constitutional law does not explicitly treat the “state action” inquiry differently depending on what right has been violated by the supposedly private actor, it seems possible that US law too is specially reluctant to find race discrimination so private as to be immune from constitutional challenge.\textsuperscript{114} Here, the unavaila-

\textsuperscript{112} S 9(5).
\textsuperscript{113} The Civil Rights Cases, 109 U.S. at 20.
\textsuperscript{114} See Chemerinsky, supra note 90, at 540. Perhaps the most prominent example of this special reluctance to immunize private racial discrimination is Shelley v. Kraemer, 334 U.S. 1 (1948). See also Edmonson v. Leesville Concrete Co., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting) (attacking what he viewed as the Court’s “overhaul” of state action law in finding state action in private litigants’ race-based peremptory challenges to potential jurors).

Historically, it seems fair to say that much of the pressure to abandon state action limitations, from scholars and probably from litigators as well, came from the recognition that those limits operated to immunize putatively private racial discrimination that was often society-wide and covertly engineered by states. See, e.g., Charles L. Black, Jr., The Supreme Court—1966 Term: Foreword: “State Action,” Equal Protection, and California’s Proposition 14, 81 HARV. L. REV. 69, 70 (1967) (addressing “the ‘state action’ doctrine and its arrested metamorphoses only as touching the field of racial discrimination”); David A. Strauss, State Action After the Civil Rights Era, 10 CONST. COMM. 409, 409-14 (1993); Maimon Schwarzschild, Value Pluralism and the Constitution: In Defense of the State Action Doctrine, 1988 SUP. CT. REV. 129, 155-56. Two scholars have suggested that the Court largely solved the state action problem in the area of race by broadly reading a federal statute barring many forms of private race discrimination — thereby removing the need for litigants to frame constitutional claims. Robert J. Glennon, Jr. & John E. Nowak, A Functional Analysis of the Fourteenth Amendment “State Action” Requirement, 1976 SUP. CT. REV. 221, 222-23.

In the civil rights era and the years that followed, academic criticism of state action doctrine was intense. Mark Tushnet wrote in 1988 that “[a]cademic commentators [were] almost unanimous” in believing that the state action doctrine should be replaced with a substantive balancing of the constitutional interests in question. Mark Tushnet, Shelley v. Kraemer and Theories of Equality, 33 N.Y.L. SCH. L. REV. 383, 391 (1988). As Tushnet pointed out, however, it was striking that the Court had tenaciously adhered to this body of law. A number of scholars in recent years have also found some merit in this doctrine. See Cole, supra note 88; Richard S. Kay, The State Action Doctrine, The Public-Private Distinction, and the Independence of Constitutional Law, 10 CONST. COMM. 329 (1993); Krotoszynski, supra note 7; Schwarzschild, supra; Barbara Rook Snyder, Pri-
bility of AIDS drugs means likely death, from a disease that could be forestalled for years or even (for newborns) perhaps prevented altogether, of a large fraction of the South African population. This is an outrageous result, and strongly supports applying the right of access to private actors.

D. Suggestions from the law of "state action"

Though the application of section 27(1) to the pharmaceutical companies is hardly free from doubt, the sheer horror of the AIDS crisis generates so strong a claim of right that this alone produces a powerful momentum for applying section 27(1) to the claims of AIDS sufferers against the companies' pricing policies. But this analysis under 8(2) does not take us quite as far as might be supposed. What if the target of the litigation were not a pharmaceutical company but a pharmacist — and not the owner of a nationwide chain of drug stores but a sole proprietor in a small community? Or a private medical clinic with a supply of AIDS medications? The pharmacist and the clinic, like the multinational drug companies, hold life and death on their shelves. Within some limits, presumably both the pharmacist and the clinic, like the drug manufacturers, could reduce the prices they charge to patients without financial disaster. But the case for applying section 27(1) to these actors seems less compelling than the case for reaching the pharmaceutical companies, even though the nature of the right and the nature of the duty at stake seem quite similar.

One way to describe the difference between these actors and the pharmaceutical companies is simply to say that these smaller entities bear less resemblance to the state. The pharmaceutical companies are,
first of all, much richer and more powerful; indeed, the companies operate on a level of international economic and political power that has allowed them, until recently, to threaten governments. As a result, they have a power to oppress that resembles the power of states. The individual pharmacist or even the private clinic, in contrast, do not seem to wield as frightening a level of power. Influential as either entity might be at a local level, they presumably have little ability to coerce entire nations. Certainly they have less authority over drug prices in particular, since they themselves must purchase the drugs from the pharmaceutical companies. Moreover, there are probably often other pharmacies, and other clinics, to which AIDS sufferers could try to turn; while these other actors might also be disinclined to give away medications, none of them individually would wield quite the level of market power that the pharmaceutical companies enjoy.

115. According to one report:

The South African pharmaceutical industry, which included subsidiaries of American and European companies, took the pressure much further. It closed factories, canceled investments and took out scare ads suggesting that babies could be hurt by counterfeit generic drugs. Its chief lobbyist, Mirryena Deeb, threatened to cut off all new drug discoveries to South Africa if the new law [permitting circumvention of patent restrictions] passed, including AIDS drugs, cancer drugs and antibiotics. Asked in a March 1998 interview if she was literally threatening to let thousands of South Africans die, she reluctantly conceded: 'In so many words, yes.'

Donald G. McNeil, Jr., As Devastating Epidemics Increase, Nations Take on Drug Companies, N.Y. TIMES, July 9, 2000, at 8.

Ultimately, the pharmaceutical industry chose to bring suit in South Africa to challenge the country’s provisions for potential restriction of patent rights, contained in the Medicines and Related Substances Control Amendment Act 90 of 1997. This step proved to be a tremendous mistake. The case became a “public relations disaster,” spawning “demonstrations around the world,” and generating support – for South Africa’s right to adopt the law – from the United States, the European Union and the World Trade Organisation. Chris McGreal & Sarah Bosely, Drug Giants Told to Reveal Secrets, THE GUARDIAN, Mar. 7, 2001 (available on LEXIS). The industry ultimately chose to withdraw the case, in an agreement facilitated by United Nations Secretary General Kofi Annan, while several manufacturers “slashed the prices of their AIDS medicines to levels unimaginable even two months earlier.” Rachel L. Swarns, Drug Makers Drop South Africa Suit Over AIDS Medicine, N.Y. TIMES, Apr. 20, 2001, at A1.

The settlement “was expected to embolden other developing countries that have also been calling for cheaper drugs to deal with the spreading AIDS epidemic.” Id. A recent World Trade Organization declaration may provide further support. See Melody Petersen, U.S. Companies Largely Back Trade Decisions; Agreement on Medicines, N.Y. TIMES, Nov. 15, 2001, at C3. While it is heartening to see that such arrogant power can be defeated, it remains true that private actors such as the pharmaceutical industry can wield tremendous power. (For a report of a recent debate over whether patents are actually the cause of poor Africans’ inability to purchase AIDS drugs, however, see Donald G. McNeil, Patents or Poverty? New Debate Over Lack of AIDS Care in Africa, N.Y. TIMES, Nov. 5, 2001, at A6.)
While the crux of the difference between the multinationals and the local medical facilities is power, it is not surprising to find that this difference in power corresponds to, and grows partly out of, differences in relations between these private actors and the state. All of these actors, to be sure, have links to the state. The state provides, or tries to provide, the law enforcement and other basic services that enable all of them to operate. It probably regulates all of them. It may well license all of them to do business. Those licenses, in turn, give pharmacists and medical practitioners some measure of market power, at least along with other members of their professions. But the state also gives to the pharmaceutical companies a particular set of rights which none of the other actors in this scenario possesses, legal claims that are a central source of the companies’ power: the rights of patent, which enable the companies to block competing production for substantial periods and thus potentially to reap monopoly profits on their drugs. These rights are secured by national and international legal provisions, buttressed, no doubt, by diplomatic pressure and the companies’ domestic political influence. In sum, the pharmaceutical companies wield great power, power linked significantly to the state — and with this power they constrain the state’s performance of its duty to provide access to health.

Without this assessment of the companies’ role, the analysis of the nature of the right and of the corresponding duty which the preceding section set out is incomplete. American scholars have repeatedly attacked American state action doctrine because it does not explicitly and frankly consider the nature of the underlying rights at stake, and instead looks only to the private or non-private status of the actors involved. Section 8(2) avoids that pitfall — but if this section is read to

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116. Even though individual pharmacists or physicians have not been granted monopoly power by the state, it may be argued that the members of licensed professions, collectively, are monopolists and therefore rightly subject to constitutional regulation. I am not sure, however, what a collective constitutional duty would mean for each individual member of the profession, and I am hesitant about treating the not-terribly-powerful individual members of professions as collectively subject to constitutional duties that they would not individually incur.

117. See Paul Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296, 1330 (1982) (arguing that “the Court’s state action doctrine seems a crude substitute for addressing and accommodating the concerns to prevent abuse of power on the one hand, and to protect individual autonomy and federalist values on the other”); Chemerinsky, supra note 90, at 537-42; Glennon & Nowak, supra note 114, at 228-32 (arguing that the Supreme Court has actually, though not explicitly, weighed claims of rights in its state action decisions); Louis Henkin, Shelley v.
exclude any attention to the status of the actor, then it has escaped one pitfall only to encounter another.

As we have already seen, however, sections 8(2) and 239 between them confirm the continuing relevance of the distinction between state and private actors. Section 239 specifically focuses on certain forms of state-connectedness in determining which seemingly private entities should be classified as organs of state. Section 8(2) also permits exploration of the actor's status. "[T]he nature of the right and the nature of any duty imposed by the right" are concepts broad enough to encompass attention to the status of the actors as well as their actions, if the status of the actor actually makes any difference to the proper extent of his or her constitutional duties — and surely it does. To impose a burdensome duty is, after all, more appropriate if the duty-holder is able to bear that duty, or if the duty-holder has taken actions which make it morally fair to impose that duty in response. On either score, the status of the actor, measured in terms of such factors as power, position in society, and past conduct, may be very relevant to the constitutional calculus. Imposing a duty may also be less appropriate if, for example, the potential duty-holder has strong countervailing claims that justify his or her acting in a way that would not comport with that duty, and the status of the actor may be relevant on this score as well. An individual may be entitled to discriminate in certain intimate contexts, for example, whereas an entity linked to the state may be seen as having no such private liberties.

American "state action" law provides helpful indications of the nature of these factors bearing on the status of the actor that deserve consideration. Although the power of the actor is not, as such, a dispositive factor in this field of law — an omission that South Africa should correct — broadly the cases direct our attention to those
factors that "in all fairness" make the action of a private party attributable to the state. These factors include whether the private actor is performing a public function; whether the state has compelled or encouraged the action in question; and whether the state is intertwined with the private actor. These factors can all help to highlight private actors who are exercising overweening power — and also to identify less dominant actors whose authority nevertheless has special links to the state.

We have already explored the "public function" inquiry. In considering this issue in the context of section 239, however, we focused a good deal of attention on the distinct question of whether the entity performing the public function did so "in terms of" constitutional or legislative provisions. I urged a somewhat constrained interpretation of "in terms of," precisely in order to avoid an almost infinite potential expansion of the reach of section 239. In the context of section 8(2), however, South African courts do not face the stark choice (is an entity an organ of state, or is it not?) posed by section 239. Instead, they can take public function considerations into account, along with others — notably including a direct analysis of the rights and duties at stake — to resolve the application question wisely. In this context, it might well make a difference that a private actor is performing a public function, even if that action is utterly without any sanction in the law.

Suppose, for example, that a vigilante group undertakes not only to apprehend criminals, but also to try them and inflict corporal punishment on those found guilty. All of this would amount to a usurpation, perhaps a completely arbitrary and lawless usurpation, of the state function of enforcing the criminal law. Why make these actions, and not an equally lengthy series of criminal assaults carried out simply for personal gain, a constitutional matter? One good reason would be because without a state monopoly on the institutions of law enforcement the society faces dangers even worse than those of widespread crime, dangers on the lines of the creation of dictatorial fiefdoms. In short, the status of the actor — or, more precisely, the status of the role that the actor has assumed — bears on the rights and duties that the constitution should be found to protect.

ever, that its assessment cannot be one of the factors employed in deciding when to apply constitutional duties to private actors.

119. See Edmonson v. Leesville Concrete Co., Inc., 500 U.S. at 621.
120. See text at notes 29-33 supra.
The question of whether the state has compelled or encouraged the private action requires consideration of a range of interactions between public and private parties. The clearest cases, certainly, would be instances where the state forces private actors to engage in some action that would be unconstitutional for the state to undertake. The well-known case of *Shelley v. Kraemer* illustrates this situation.121 There the plaintiffs sued to enforce a racial covenant barring sales of houses to African-Americans; the white seller and African-American buyer were willing to complete the transaction but the courts, if they enforced the covenant, would force discrimination to take place. It is important, however, not to think that every instance of state coercive power amounts to state action. Suppose, for example, that a church wishes to exclude non-believers from a ceremony. Ultimately, such exclusions can only be enforced through private pressure or violence or by calling the police; if the police are called and arrest the unwelcome attenders for trespass, then state coercive power has been employed. In this setting, however, the state has not compelled anyone to discriminate, and it would be unlikely that the availability of the police would make the church’s exclusionary action into “state action.”122

It could certainly be said, however, that the government’s willingness to send the police to the church encourages the church to maintain its policy of exclusion. So does its continued provision of services such as sewage, trash collection and firefighting. In a sense, every action that the government does not forbid it encourages, at least as compared to the actions it does prohibit. If the division between state and private action means anything, it must mean that some encouragement greater than this is required to link the private actor to the state so as to justify, on this ground, the application of constitutional limits to the private actor.123 Current case law insists that “[m]ere approval of or acquiescence” by government in private initiatives is not sufficient.124 Specific governmental authorization of a particular private practice might provide the necessary additional link, though American case law on this point is quite mixed.125 Funding the activity in ques-

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121. 334 U.S. 1 (1948).
122. The U.S. Supreme Court avoided deciding the question of whether purely private racial exclusions could be enforced by the state without constituting state action. See *Bell v. Maryland*, 378 U.S. 226 (1964); Glennon & Nowak, *supra* note 114, at 240.
125. Compare *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967) (private real estate discrimination held to be state action because a California state constitutional amendment
tion might also provide this encouragement, but current cases make clear that funding by itself is by no means enough. 126

Finally, government and private actors may be so closely linked to each other that supposedly private actions are fairly treated as public. Some of the circumstances already mentioned matter in this regard as well: for example, financial dependence is a form of linkage, and mutual financial dependence or a "symbiotic relationship" may be especially important. 127 The fact that the private activity takes place on state

barring legislative prohibition of such discrimination in effect "constitutionalized the private right to discriminate," even though the state might well have been free simply to repeal its existing anti-discrimination statutes); Public Utilities Commission v. Pollak, 343 U.S. 452, 462-63 (1952) (finding it necessary to consider the First and Fifth Amendments' application to a bus company's piping in radio on its buses "particularly" because the Public Utilities Commission "pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby"); McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 161-62 (1914) ("It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or service in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded"); with Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 165 (1978) (state statute authorizing warehouseman to sell goods placed with him to cover unpaid charges held not to be "sufficient encouragement to make the State responsible" for the sale); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 354, 357 (1974) (Public Utility Commission's approval of a "general tariff" including a provision stating the company's "right to terminate service for nonpayment" does not make such termination state action; "[a]pproval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action'"). 126. See Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (finding that personnel decisions by a private school that was funded almost entirely by the state were not state action). Cf. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-52 (1974) (state's conferral of monopoly position on a private utility company held "not determinative" of whether its cut-off of service to a customer was state action, although "[i]t may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics"). 127. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (city-owned parking facility leased space to a restaurant which discriminated on the basis of race). The Supreme Court has rarely followed Burton in other cases. But in a recent decision, Brentwood Academy v. Tennessee Secondary School Athletic Assn., 121 S.Ct. 924 (2001), the Court found that a "not-for-profit membership corporation," whose members were public and private — but predominantly public — schools, id. at 928, was engaged in state action because of "pervasive entwinement [with the state] to the point of largely overlapping identity." Id. at 934. (Emphasis added.)
property may also be important, particularly because the physical location makes it more likely that other people will view the action in question as attributable to the state.\textsuperscript{128} Extensive state regulation of the private actor might also be seen as a form of interweaving, although current case law insists that such regulation is not dispositive if it does not actually address and constrain the particular conduct by the actor that is being challenged.\textsuperscript{129} Providing a rationed resource — such as playing time on publicly maintained sports fields — might also implicate the state in the private conduct, both by assisting that conduct and by precluding competing uses by other private actors who would not compromise constitutional values.\textsuperscript{130} And, finally, joint participation by private actors and public officials — for example, in a “corrupt conspiracy involving bribery of [a] judge,”\textsuperscript{131} but also in some much less egregious contexts — will make the private actors’ conduct state action, though by no means every coincidence of interests between private and public actors amounts to joint conduct.\textsuperscript{132}

\textsuperscript{128} See Burton v. Wilmington Parking Authority, 365 U.S. at 723-26; Edmonson v. Leesville Concrete Co., Inc., 500 U.S. at 628 (race-based peremptory challenges to potential civil jurors are made in “the courthouse itself”); Georgia v. McCollum, 505 U.S. 42, 53 (1992) (making the same point with regard to peremptory challenges by criminal defendants).

\textsuperscript{129} “[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.” Jackson v. Metropolitan Edison Co., 419 U.S. at 351. See also American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) ( insurers’ decision to “invoke utilization review” and withhold insurance benefits pending that review is not state action, even though the utilization review system is an adjudicatory system created by the state, because the state “authorizes, but does not require, insurers to withhold payments for disputed medical treatment” and the state neither compels nor sets standards for the insurers’ decisions).

\textsuperscript{130} See Gilmore v. City of Montgomery, 417 U.S. 556, 574 (1974) (rationing of “otherwise freely accessible recreational facilities” will present a stronger case for finding state action “than if the facilities are simply available to all comers without condition or reservations”); but cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 544 (1987) (federal statutory grant to USOC of exclusive use of the word “Olympic” is comparable to, though more extensive than, typical trademark rights, and does not make USOC’s conduct into state action).

\textsuperscript{131} Dennis v. Sparks, 449 U.S. 24, 28 (1980).

\textsuperscript{132} See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 486 (1988) (“when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found”; here, state action found in probate court’s involvement in application of a statute barring claims against estate that are not filed within a specified period); Lugar v. Edmonson Oil Co. 457 U.S. 922, 942 (1982) (finding joint participation, and hence state action, “when the State has created a system whereby state officials will attach property on the ex parte application of one
E. The relevance of state action considerations

As the preceding discussion suggests, the current state action jurisprudence of the United States Supreme Court takes a relatively restrictive view of the circumstances under which private action should be viewed as public. It is not my intention to argue that South Africa should embrace this particular view. I do suggest, however, that South African decisions under section 8(2) should take into account the various factors, many of them identified in American case law, that establish the extent of the links between a putatively private actor and the state. These factors can help the courts to identify those cases in which the Bill of Rights should be applied, and they may well also help the courts to determine, in these cases, when to render explicit constitutional rulings.133

In making this suggestion, I acknowledge that it may sometimes be very difficult to distinguish clearly between those private actors with close links to the state and those with less significant ties. It is possible to argue that every legal action is state action, since every such action is authorized by law and ultimately every actor who abides by the law is enabled to act by the protection of the legal system. It can also be argued that every illegal action is state action as well, since it represents a failure by the state to prevent illegality.134

But while state action may well be omnipresent, it does not follow that all private actors are equally linked to the state. Surely the truth is quite the opposite. Private individuals who actually conspire with state officials, for example, have created an interlocking between themselves and state authority that other people do not share. The citizens of a modern state, where government regulation is pervasive, are more engaged with the state than their forebears in the less regulated world of party to a private dispute.

133. On the different ways the Bill of Rights can be used in South African adjudication, see page [628] supra.

134. For careful arguments that all action is state action under positivist and natural law philosophical approaches, see Chemerinsky, supra note 90, at 522-31. Other scholars have also concluded that state action of some sort is ubiquitous. See, e.g., Larry Alexander, The Public/Private Distinction and Constitutional Limits on Private Power, 10 CONST. COMM. 361, 362-64 (1993); Kay, supra note 114, at 334-37.

But see id. at 951 n.8 (Powell, J., dissenting) (arguing that majority mistakenly found state action in this context, and noting that “[i]t is unclear why a private party engages in state action when filing papers seeking an attachment of property, but not when seeking other relief (e.g. an injunction), or when summoning police to investigate a suspected crime”).
Moreover, the fact that there is some measure of state action in all conduct does not logically preclude us from identifying a category of action that we will treat with special constitutional stringency. Whatever the ambiguities at the margins, after all, we have no difficulty in distinguishing the government itself from the rest of the individuals and private entities in society—even though government officials, like the rest of society, are engaged in state action. If the factors used in state action inquiries were so formless that actual decisionmaking using them were truly unpredictable, then we would be well advised not to invoke them, but in practice (even if not in theory) it seems to me that this body of law is more coherent than that.

It seems particularly appropriate to pay attention to the elements of state-connectedness, finally, because those elements are today so much under political control. South Africa—or the United States—can pursue most governmental objectives by establishing state bureaucracies to achieve them; by relying on private actors, but enmeshing them in elaborate regulations; and by resting much greater discretion and freedom from oversight in individual people. As long as it is reasonably clear what level of constitutional regulation each of these choices will trigger, each country can shape its social policies with the constitutional consequences in mind. A South African private actor's susceptibility to constitutional duties, therefore, is not an ineffable abstraction but rather should be largely a product of conscious political choice—both by the framers of the constitution and by the legislators and administrators who establish levels of state-connectedness through the policies they shape.

That said, the inquiry we should make is not into the sheer numerical total of private-public links in any case, but rather into their character. Put differently, the “state action” aspect of the section 8(2) inquiry should be into whether the connections between the private actor and the state make imposition of constitutional obligations on that actor more or less appropriate. This reformulation is only helpful, however, if the “state” or “private” character of an actor really does have any relevance to determining whether that actor should be placed under constitutional obligations. I have already argued more generally that the “status” of the actor is relevant to the nature of the

135. Seidman observes that when, in the New Deal, “government regulation was the norm rather than the exception, virtually all conduct came to be seen as, in some sense, resting on an entitlement created by government.” Seidman, supra note 86, at 397-98.
rights and duties he or she should shoulder;¹³⁶ here let us look more precisely at the significance of the actor’s state-connectedness. In undertaking this examination, I do not mean to argue that state-connectedness is ordinarily dispositive by itself, or to suggest that South African courts should disregard the more direct inquiries into the nature of the right and of the duty associated with it that our discussion of the pharmaceutical companies began with. I argue only that the factors of state-connectedness suggested by American state action are relevant too. As we will see, they are relevant in four respects.

First, extending the constitution’s reach to the relations of private actors expands the responsibilities of the courts beyond the protection of individuals against the state, the rights protection function that seems most firmly rooted in South African legal tradition and most central to the constitutional law of Western countries.¹³⁷ Even the task of revising the common law in light of constitutional values, in cases where the Bill of Rights is not considered applicable as such, is a formidable one. South Africa’s Constitutional Court has already addressed a very wide range of more traditional questions of individual rights and government power in its effort to create a jurisprudence for a new nation. That court, and those below it, have reason not to travel too swiftly, or too far, in even more innovative directions, because it is at least possible, as we saw earlier, that these new directions will entail substantial risks to majoritarian decisionmaking and to the protection of rights. Using the links private actors have with the state as a guidepost in choosing which private actors to bring under constitutional duties will tend to keep the courts on relatively better mapped terrain.¹³⁸

Second, cases in which the private actor wields power closely linked to the state may feature more risk of oppression than those in which the private actor’s conduct is more independent of state aid. I

¹³⁷. The application of socioeconomic rights to private actors will surely involve particularly novel jurisprudential issues.
¹³⁸. In addition, it seems fair to say that when the state itself is the constitutional wrongdoer, the blow to separation of powers entailed in judicial intervention is less acute than where the state is without fault. After all, the purpose of establishing a separation of powers is not to insulate any branch’s wrongdoing from effective control. As Sprigman and Osborne observe, “the Constitution must of necessity be enforced in such instance by the judiciary, the only body with the independence and authority required to bring the legislature to heel.” Sprigman & Osborne, supra note 43, at 48. To the extent that private actors with state connections are, indeed, linked to the state itself, again the blow to political branch prerogative entailed in judicial intervention seems less acute.
do not mean that the relation of citizen to state is always more threatening than the relation, say, of citizen to corporation. On the contrary, section 8(2) reflects the framers' belief that sometimes these two relationships pose very similar dangers of harm to constitutional values. But section 8(1) reflects a clear judgment that state power is always potentially worrisome. If we learn that a private entity is highly regulated by the state, or funded by the state, or working closely with the state, or performing a task usually performed by the state, we may have reason to conclude that the power wielded by that entity is like state power.

Third, even where actors linked to the state do not exercise specially oppressive power, their links to the state may give us particular moral reason to regulate their conduct. When a private actor is closely regulated by the state, but permitted to discriminate, we may well ask why the state did not extend its regulatory reach just a little further, to bar this conduct. The same may be said when the state chooses to fund a private actor, or to work closely with one, or to entrust a public function to one. In all these cases, we may be concerned partly with the simple extent of power, but we may also be concerned with our own complicity, through the state that we help govern, in whatever power, large or small, is being exercised.139

Fourth, the presence or absence of connections with the state is likely to be very relevant to determining which private actors have the strongest moral claims to exemption from constitutional duties. Even if South African law ultimately concludes that the state in some circumstances can possess constitutional rights, it is hard to conceive of the state as having the same claims to liberty as a private individual does. The state cannot exclude or disregard any of its citizens. An entity like the state — a large, highly regulated utility, for example — might be similarly obliged to serve all potential customers, or at least not to deny any of them access to its services. But a private individual needs a range of liberties in such aspects of life as marriage, cultural affiliation, and personal friendships.140 Where these liberties are potentially invaded,

139. Barbara Rook Snyder has defended the state action doctrine on the ground that “[t]he representative nature of [state actors’] roles is more than symbolic; it is real.” Snyder, supra note 114, at 1061.
140. Cockrell observes that “relationships between private individuals are far more complex than relations between the state and citizen, for they involve not only the exercise of power but also other subtly nuanced constituents such as love, hatred, kinship, sexuality, intimacy etcetera.” Cockrell, supra note 48, at 3A-12.
there may be most reason for courts not to impose constitutional duties.

If South African courts use the state action inquiries to respond to these four considerations – rather than to attempt a numerical count of levels of state connection – then I suggest they will be able to make better choices about whether to apply the Bill of Rights to private actors than they otherwise would. Certainly there may be other actors, with little special connection to the state, who also should be regulated under the constitution. A husband violently abusing his wife might be such a person.\(^{141}\) So might a householder dominating the life of a servant, or a parent sexually molesting his child. I am uneasy about extending the constitution’s reach to the conduct of so many individuals in so many contexts, but reading section 8(2) to encompass a “state action” inquiry by no means rules out such choices. The state action issues are part of the inquiry into the nature of the right and the nature of the duty associated with the right that section 8(2) mandates; they are also, in particular, part of the inquiry into the extent and the justification of the power one actor wields over another. But they are not the whole of these inquiries, and South African courts will certainly be able to decide that a private actor with no specially significant links to the state is still, for other reasons, someone whom the constitution should regulate.

**Conclusion**

For these reasons, the questions that American state action jurisprudence raises remain pertinent, even in the context of the South African constitution’s much greater receptiveness to the idea of horizontal application of rights. I have argued here that in undertaking this expansion of the constitution’s reach, the courts will have reason to proceed with some caution – to “make haste slowly.” One of the great virtues of section 8(3)’s emphasis on constitutional common law or indirect application is that courts can proceed this way. Indeed, they can choose today to treat a matter as not calling for the “application” of the constitution at all, and conclude after some years’ experience, as a common law court would, that accumulated wisdom calls for a change of approach. Even if the courts decide never to “apply” the Bill of Rights in a particular area, moreover, they will still be able, and

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obliged, to promote Bill of Rights values as they work with the common law and legislation that do apply.

But a measure of caution by no means precludes the "application" of the Bill of Rights to some private actors today, even if they are not "organs of state" under section 239. While the question is a complex one, the terrible force of the patients' rights at stake in the context of AIDS drug prices, and the links pharmaceutical companies' power has to the state, suggest that these companies might rightly be found to have a constitutional duty to provide access to their drugs. On the other hand, the individual parent who lacks the money to give her child even basic nutrition no doubt should be subject to the law's power (and hopefully the law's aid), but it hardly seems appropriate to transform such issues of individual difficulty into constitutional cases.

In between are cases like the builder of low-income housing, neither so powerful as the pharmaceutical company nor engaged in conduct so personal and individual as that of the parent. Here, the various factors suggested by American state action jurisprudence may be very helpful in distinguishing those private actors who should be subject to the constitution's claims from those who should not. A builder who enters into a private contract with a particular buyer for a dwelling, even a substandard one, does not seem to have any connection with the state that would call for constitutionalizing the regulation of his or her actions. In contrast, a builder who obtains subsidized financing pursuant to a government housing program, or who contracts with the government to build particular houses for the government to make available to would-be buyers, or who takes advantage of special housing code provisions passed in an effort to facilitate housing construction for poor people — and especially a builder with multiple links of this kind — might well be seen as the equivalent of a state actor with respect to the claims of those seeking housing.¹⁴²

Any recognition of constitutional duties incumbent on private actors would amount to a significant departure from the general position

¹⁴². The same would not be true with respect, for example, to the free speech claims of the builder's employees. A builder who receives subsidized financing has a link to the government with respect to the houses he or she builds, but the government has no evident involvement with the same builder's decision to bar political speech on the construction site. Unless the government somehow involved itself with the suppression of speech — for example, by informally telling the builder that no loans would be forthcoming unless dissident speech was suppressed — the builder's actions in this regard should be treated, at least so far as state-connectedness is concerned, as outside the constitution's purview.
adopted by the Constitutional Court in its first encounter with the horizontality problem. The 1996 constitution appears to reject the *Du Plessis v. De Klerk* approach at least in part, however, in favor of far-reaching — but ambiguous — authorizations of the application of constitutional rights to private actors. Taking up the invitation of the new constitution is a challenging and potentially somewhat risky enterprise, but I do not in the least mean to urge South Africa’s courts to resist this invitation. Rather, I have sought to demonstrate that American state action doctrine can provide South Africa with one set of factors to use in deciding when to apply the constitution in this way. These factors are by no means the whole of what South African courts will need to consider, and they do not turn challenging issues into easy ones, but I hope they will assist the South African courts as they chart this new ground.