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**PRIVATE LAW, FUNDAMENTAL RIGHTS,  
AND THE RULE OF LAW**

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I.	INTRODUCTION.....	1
II.	THE CONSTITUTIONALIZATION OF PRIVATE LAW .....	3
III.	THE FEAR OF CONSTITUTIONALIZATION .....	8
IV.	THE DISTINCTION BETWEEN PUBLIC AND PRIVATE LAW .....	12
V.	THE DISRUPTION OF INDIRECT EFFECT.....	15
VI.	THE BENEFICIAL EFFECTS OF CONSTITUTIONALIZATION.....	20
VII.	THE RULE OF LAW .....	22

I. INTRODUCTION

I am honored and delighted to be invited to give this lecture in the distinguished series of the C. Edwin Baker Lecture for Liberty, Equality, and Democracy. I am grateful to Professor Anne Lofaso and Dean Gregory Bowman for giving me the opportunity to visit West Virginia for the first time and for their generous introduction. What a pleasure it is, in particular, to address so many first year law students at the commencement of their studies of jurisprudence.

It was mentioned in the introductory remarks that the first holder of my current appointment, the Vinerian Chair at Oxford, was William Blackstone. He published his lectures in a collection of four volumes known as *The Commentaries*.<sup>1</sup> In the middle of the eighteenth century, this best-seller became the definitive statement of the common law. Those books disseminated knowledge of the common law throughout the British territories and colonies. Their summary of the common law provided a definitive exposition of the laws that the United States and the United Kingdom still share to this day.

As well as engaging readers with many a fine turn of phrase, Blackstone's *Commentaries* were attractive to lawyers on both sides of the Atlantic, I believe, because they presented the common law as an integrated and coherent whole. Instead of perceiving the law as a collection of bits and pieces contained in judicial precedents and fragmentary legislation, Blackstone articulated a vision of the common law as a coherent body of law that was based on a systematic arrangement of rights and principles. The common law, as he presented it, contained protection for the liberties of citizens, controlled

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<sup>1</sup> 1-4 WILLIAM BLACKSTONE, COMMENTARIES.

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governmental power by means of the rule of law and constitutional restraints, whilst at the same time supporting trade and agriculture by protecting property rights and transactions. In Blackstone's eyes, the common law both reinforced high moral standards and, at the same time, respected the liberty of everyone against the tyranny of despots.

Since the eighteenth century and Blackstone's comprehensive account, we have tended to disaggregate our knowledge and accounts of the common law. We study it in parts such as constitutional law, property law, contract law, and tort law. Perhaps the greatest divide in this understanding of the architecture of the legal system lies between public law and private law. These fields of law are often studied during separate years at law school. Public law, which includes constitutional law, administrative law, and criminal law, primarily concerns the relations between citizens and the state. Its most important rules are those fixed in an applicable constitution, including its Bill of Rights. Private law, which includes property law, family law, contract law, and tort law, is essentially concerned with social and economic relations between private individuals, and by extension, corporations. Private law is governed by an underlying principle of equal respect for the rights of others, violation of which requires corrective compensation to be rendered to the victim.

One of the consequences of the widespread acceptance of this divide between public law and private law in our understanding of the legal system is that, unlike Blackstone, we do not typically recognize that constitutional law may provide rules and principles that should also determine the content of private law. In particular, we have for a long time ignored Blackstone's perspective that the fundamental rights or liberties of individuals apply both in constitutional law and in private law. That sharp divide between public law and private law has, however, been challenged in recent years in Europe. One label given to this intellectual development has been the "Constitutionalization of Private Law."<sup>2</sup>

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<sup>2</sup> E.g., CONSTITUTIONALISATION OF PRIVATE LAW (Tom Barkhuysen & Siewert D. Lindenberg eds., 2006); Hans Micklitz, *Introduction*, in CONSTITUTIONALIZATION OF EUROPEAN PRIVATE LAW: XXII/2 1 (Hans Micklitz ed. 2014). Many other books describe this phenomenon in jurisdictions around the world, though not always using the same terminology of the constitutionalization of private law. See, e.g., 1 FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION: A COMPARATIVE OVERVIEW (Gert Brüggemeier et al. eds., 2010); EUROPEAN CONTRACT LAW AND THE CHARTER OF FUNDAMENTAL RIGHTS (Hugh Collins ed., 2017); HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedmann & Daphne Barak-Erez eds., 2001); STEFAN GRUNDMANN, CONSTITUTIONAL VALUES AND EUROPEAN CONTRACT LAW (2008); Martijn Hesselink, *The Horizontal Effect of Social Rights in European Contract Law*, in MARTIJN HESSELINK, THE NEW EUROPEAN PRIVATE LAW 177 (Kluwer Law International ed., 2002); THE IMPACT OF THE UK HUMAN RIGHTS ACT ON PRIVATE LAW (David Hoffman ed., 2011); CHANTAL MAK, FUNDAMENTAL RIGHTS IN EUROPEAN CONTRACT LAW: A COMPARISON OF THE IMPACT OF FUNDAMENTAL RIGHTS ON CONTRACTUAL RELATIONSHIPS IN GERMANY, THE NETHERLANDS, ITALY AND ENGLAND (2008); 1 HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY (Dawn Oliver & Jörg Fedtke eds., 2007).

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Although Blackstone would probably have been untroubled by this development in legal reasoning, in recent decades it has generated controversy and even considerable hostility in legal scholarship.<sup>3</sup>

My aim in this lecture is to explain the concept of the constitutionalization of private law and to consider why it is controversial and even feared. I will set out, in particular, five concerns frequently voiced against the movement in legal reasoning towards the constitutionalization of private law. I will then explain why I think that the concerns of the critics tend to be exaggerated and the challenges to existing private law relatively minor. As well as viewing this fear of the constitutionalization of private law as largely misplaced, I shall argue that this movement for the constitutionalization of private law is potentially beneficial in the sense that it provides a mechanism by which the common law can be adjusted to modern values, including the values of liberty, equality, and democracy. Moreover, I shall argue that the constitutionalization of private law forms part of a broader intellectual movement to reconceive the foundations of the legal system not in terms of a closed system of rules but rather as a coherent body of individual rights.

## II. THE CONSTITUTIONALIZATION OF PRIVATE LAW

What is meant by the phrase “the constitutionalization of private law?” The core idea is that the laws of contract, tort, or property have to be designed or developed by the judges in a way that aligns all fields of private law with constitutional rights. The meaning of the requirement of alignment is slightly vague, but its thrust is clear. It signifies that although private law does not have to duplicate constitutional rights exactly, it should not contradict or subvert constitutional rights. In practice, the requirement of alignment means that courts should interpret and develop private law rules and doctrines in a way that ensures that their content conforms to, and is consistent with, the rights that are protected in the relevant constitution. The relevant fundamental rights are those to be found in the constitution or bill of rights or international human rights treaty that governs the action of the particular court that must decide a private law dispute.

Since private law is state law in the United States, in most cases the immediately relevant constitution should be the state constitution containing a bill of rights. The federal constitution may also be relevant, however, since some articles of the constitution such as the Fourteenth Amendment regulate the powers of the states and their courts in some respects.<sup>4</sup> In the United Kingdom, the Human Rights Act 1998<sup>5</sup> requires courts to ensure that their judgments

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<sup>3</sup> *E.g.*, CONSTITUTIONALISATION OF PRIVATE LAW (Tom Barkhuysen & Siewert D. Lindenberg eds., 2006).

<sup>4</sup> U.S. CONST. amend. XIV.

<sup>5</sup> Human Rights Act 1998, c. 42 (UK).

conform to the requirements of the European Convention on Human Rights,<sup>6</sup> which contains a list of rights not dissimilar from those in the U.S. Constitution.<sup>7</sup> That European Convention on Human Rights has been ratified by more than 40 countries, including Russia, Turkey, and eastern European countries.<sup>8</sup> In the European Union, the 28 Member States and the institutions of the European Union itself must ensure that their actions and decisions, including any judicial interpretations of European Law, conform to requirements of the Treaty between the Member States known as the Charter of the Fundamental Rights of the European Union.<sup>9</sup>

Guided by the relevant source of fundamental rights, a court presented with a dispute concerning the rights under private law of the litigants may be asked to take various kinds of measures to ensure that its decision conforms to or at least does not subvert respect for the relevant rights. A court might decline to enforce an otherwise legally binding document on the ground that to do so might unjustifiably interfere with an individual's enjoyment of fundamental rights. Or a court might develop a new cause of action, developing the common law in a new direction in order to ensure that private law provides adequate protection of a fundamental right. The kinds of tasks to be performed during the process of alignment can be illustrated by two famous decisions of the U.S. Supreme Court. These decisions are notorious, I suggest, mostly because they break down the divide between public and private law and engineer an alignment between constitutional rights and private law.

In *Shelley v. Kraemer*,<sup>10</sup> an African-American family named Shelly purchased a home in St. Louis, Missouri, in 1945.<sup>11</sup> They were unaware of a restrictive covenant that prevented "people of the Negro or Mongolian Race" from occupying the property.<sup>12</sup> A restrictive covenant is a special type of contractual agreement between neighbors that binds any owner of the property to which the covenant is attached, even after the original parties to the agreement no longer own the property.<sup>13</sup> Kraemer, who lived ten blocks away, but who was a beneficiary of the restrictive covenant, successfully sued in the Missouri courts

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<sup>6</sup> Council of Europe, European Convention on Human Rights, Nov. 11, 1950, E.T.S. 5, 213 U.N.T.S. 221.

<sup>7</sup> Human Rights Act 1998, c. 42, § 1 (UK).

<sup>8</sup> *Impact in 47 countries*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/human-rights-convention/impact-in-47-countries> (last visited Sept. 23, 2018).

<sup>9</sup> Charter of the Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C326) 391.

<sup>10</sup> 334 U.S. 1 (1948).

<sup>11</sup> *Id.* at 5–6.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at 4–5.

to prevent the Shelleys from obtaining possession of the property.<sup>14</sup> The local courts agreed that the purchase by the Shelley family was in breach of the covenant and that therefore under the law of property of Missouri they should be evicted.<sup>15</sup> The U.S. Supreme Court held that the racially-based restrictive covenant, as a private agreement, was not in itself invalid under the constitution, but that judges should not enforce the covenant because that would be “state action.”<sup>16</sup> Such state action would be discriminatory in the protection afforded to property rights in violation of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution.<sup>17</sup> The Supreme Court insisted that it was not requiring private individuals to conform to fundamental rights.<sup>18</sup> “[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”<sup>19</sup> Yet the order of a court, even in a private law matter, could be characterized as state action.<sup>20</sup> If so, any attempt to enforce a private agreement that subverted the constitutional principle of equal protection would be blocked.<sup>21</sup> The decision preserved, in theory, a sharp separation between public law and private law. Simply looking at the result, however, the Supreme Court required an alignment between the private law of restrictive covenants and the principle of equal protection. The decision appears to constitutionalize private law, thereby provoking continuing debate.<sup>22</sup>

Similar observations may be made about another famous decision of the U.S. Supreme Court: *New York Times v. Sullivan*.<sup>23</sup> The case concerned a successful claim for libel under Alabama law.<sup>24</sup> The Montgomery Public Safety Commissioner, L.B. Sullivan, complained that *The New York Times* had published inaccurate statements regarding police action, for which he was responsible, in connection with the civil rights movement.<sup>25</sup> In particular, the

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<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 19–20.

<sup>21</sup> *Id.* at 20.

<sup>22</sup> See, e.g., Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451 (2007); Donald M. Cahen, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CALIF. L. REV. 718 (1956).

<sup>23</sup> 376 U.S. 254 (1964).

<sup>24</sup> *Id.* at 256.

<sup>25</sup> *Id.*

publication claimed that Martin Luther King, Jr. had been arrested seven times; whereas on the date of publication, the civil rights leader had only been arrested four times (though by the time of litigation the higher number was true).<sup>26</sup> The newspaper was ordered to pay half a million dollars to Sullivan for this libel.<sup>27</sup> Litigation to reverse the decision reached the Supreme Court.<sup>28</sup> Although the award of damages for libel was a matter of private law, the Court ruled that an award of damages by a state court is “state action,” and “[i]t matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.”<sup>29</sup> Once there was a finding of state action, the First Amendment to the U.S. Constitution was applicable.<sup>30</sup> The Court declared that the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials, except when statements are made with actual malice (with knowledge that they are false or in reckless disregard of their truth or falsity.)<sup>31</sup> As a consequence, unless the story in the newspaper was deliberately false, the claim in defamation had to fail.<sup>32</sup> Again we see the alignment of private law with constitutional rights, though in this case, rather than the Supreme Court merely blocking any action to enforce private rights that undermine constitutional principles, the substantive content of the law of libel was changed in order to align it with the First Amendment.

As well as those two famous decisions of the U.S. Supreme Court, I hope you will permit me to mention an English case as a further introduction to the technique of alignment between private law and fundamental rights. The case, *McDonald v. McDonald*,<sup>33</sup> provides a salutary reminder that in private law both parties to the litigation can rely on fundamental rights.<sup>34</sup> It is a sad story about a young woman who was severely disabled, both mentally and physically.<sup>35</sup> Her parents decided that they should buy her a suitable home where she could live independently.<sup>36</sup> They borrowed money from a bank to purchase the property.<sup>37</sup> To secure repayment of the loan, the bank took a charge or mortgage over the

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<sup>26</sup> *Id.* at 257–58.

<sup>27</sup> *Id.* at 256.

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 280.

<sup>32</sup> *Id.* at 287–88.

<sup>33</sup> [2016] UKSC 28, [2017] AC 273 (appeal taken from Eng.).

<sup>34</sup> *See id.*

<sup>35</sup> *Id.* at ¶ 2.

<sup>36</sup> *Id.* at ¶ 3.

<sup>37</sup> *Id.*

property.<sup>38</sup> Her parents then gave their daughter a lease to live in the house. She contributed to the cost of the mortgage repayments by handing over some of the welfare payments she received on account of her disability.<sup>39</sup> Unfortunately, the parents became unemployed because of the financial crisis of 2008, and they fell behind on the repayments of the loan.<sup>40</sup> On their default on the loan, the bank became entitled to take possession of the property and, as the new landlord, to evict the disabled daughter by giving due notice under the terms of the lease and in accordance with statutory protections for tenants.<sup>41</sup>

There was no doubt about the legal position under the common law and statute: the law permitted the bank to deprive the young woman of her home, even though she had been paying the agreed rent to her parents. She argued, however, that such a result was incompatible with her right to a home under Article 8 of the European Convention of Human Rights, which reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>42</sup>

The Supreme Court of the United Kingdom agreed that her eviction by the bank interfered with her right to a home and that the law of landlord and tenant should be aligned with that requirement in Article 8.<sup>43</sup> But the Court went on to point out that the bank had certain fundamental rights as well, in particular, the right to respect for their possessions and property.<sup>44</sup> Article 8(2) expressly reminds the court that an interference with the right to a home may be justified by reference to the need to protect the rights of others.<sup>45</sup> The Supreme Court of the United Kingdom held that, provided the bank followed the procedures set out in legislation for the eviction and conformed to any requirement in the lease, a

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at ¶ 4.

<sup>41</sup> *Id.* at ¶ 5.

<sup>42</sup> *Id.* at ¶ 32.

<sup>43</sup> *Id.* at ¶ 40.

<sup>44</sup> *Id.* at ¶ 39 (citing Council of Europe, European Convention on Human Rights, Nov. 11, 1950, E.T.S. 5, 213 U.N.T.S 221.).

<sup>45</sup> *Id.*

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proper balance would be struck between the right to a home and the right to property.<sup>46</sup> The interference with the right to a home would be justified under a test of proportionality.<sup>47</sup> In this case, therefore, alignment required no change in the law because the statute already struck the correct balance between the rights of the parties.<sup>48</sup>

These decisions illustrate several aspects of the constitutionalization of private law by the process of alignment. The first matter to note is that constitutionalization does not permit individuals to rely on constitutional rights to bring a claim against another private individual. The role of constitutional rights is better described as one of indirect effect on the content of private law. In other words, the constitutional rights modify existing private law rules rather than create new causes of action. Nevertheless, this insertion of constitutional rights into legal reasoning with respect to private law does call into question the sharp distinction between public and private law. If the decisions of courts with respect to disputes about private law matters are always regarded as state action, then every issue in private law is potentially open to further constitutional scrutiny. As a consequence of the constitutionalization of private law, courts should, as a matter of legal method, ensure that all their decisions in both public and private law conform to fundamental rights. If that is correct, it is evident that legal reasoning must become more complex. Lawyers and judges should always consider whether, in addition to the sources of private law in the common law and statute, fundamental rights in the constitution or binding international conventions require an adjustment of the settled private law rules. Usually, as the *McDonald v. McDonald* case illustrates, courts will conclude that the rules of private law already conform to the standards of the relevant fundamental rights. That conclusion is especially likely where the democratic legislature has considered the matter and has adjusted the common law to meet modern standards and policies. The point is, rather, that the courts should always ask whether private law needs some degree of adjustment in order to bring it into line with fundamental rights.

### III. THE FEAR OF CONSTITUTIONALIZATION

Why are legal scholars concerned about this development in legal reasoning that has been labeled the constitutionalization of private law? We can identify five overlapping and, to some extent, contradictory concerns.

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



First and foremost, many private lawyers are worried that the application of fundamental rights to private law may prove extremely disruptive.<sup>49</sup> They surmise that the content of private law will be changed by the application of fundamental rights. That change will generate considerable uncertainty, leading to more litigation. Even the most settled rules of law could potentially be challenged by demands for alignment between fundamental rights and private law. As a consequence of the decision in *New York Times v. Sullivan*, for instance, the law of libel in all states was significantly modified by the protection afforded to inaccurate, though not malicious, criticisms of public officials.<sup>50</sup> Critics of constitutionalization are concerned that the demands for alignment with fundamental rights will lead to radical changes in the common law, not merely minor adjustments and developments.<sup>51</sup> In particular, they are alarmed about the possibility of the creation of new causes of action, thereby rendering conduct wrongful that was previously lawful.<sup>52</sup>

A second objection to constitutionalization of private law asserts that private law already contains the necessary subtle compromises of the interests and rights of individual citizens.<sup>53</sup> The rules of contract law, tort law, and property law can be seen as settled and detailed arrangements for protecting the fundamental interests of individuals equally. On this view, the requirements of constitutionalization have already been satisfied in the complexity of private law doctrine. Appeals to fundamental rights in private law cases would merely reopen the questions afresh by reformulating them in the abstract and uncertain language of fundamental rights.<sup>54</sup> Eventually, however, the process of constitutionalization would very likely reformulate private law to reach much the same positions as it currently maintains. That is what happened in *McDonald v. McDonald*: having considered at length the application of the European Convention on Human Rights, the Supreme Court of the United Kingdom decided that the existing law was entirely compliant with those rights.<sup>55</sup> Notice how this second objection insists that constitutionalization would be an

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<sup>49</sup> Donal Nolan, *Negligence and Human Rights Law: The Case for Separate Development*, 76 MOD. L. REV. 286, 302 (2013).

<sup>50</sup> See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>51</sup> Jan M. Smits, *Private Law and Fundamental Rights: A Sceptical View*, in CONSTITUTIONALISATION OF PRIVATE LAW 8, 9 (Tom Barkhuysen & S. Lindenberg eds., 2006).

<sup>52</sup> E.g., Jonathan Morgan, *Privacy, Confidence and Horizontal Effect: "Hello" Trouble*, 62 CAMBRIDGE L.J. 444, 444 (2003).

<sup>53</sup> Roderick Bagshaw, *Tort Design and Human Rights Thinking*, in THE IMPACT OF THE UK HUMAN RIGHTS ACT ON PRIVATE LAW 110 (David Hoffman ed., Cambridge University Press 2011).

<sup>54</sup> Olha O. Cherednychenko, *Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or Towards Walking in Circles?*, in CONSTITUTIONAL VALUES AND EUROPEAN CONTRACT LAW 35 (Stefan Grundmann ed., 2008).

<sup>55</sup> See *McDonald v. McDonald*, [2016] UKSC 28, [2017] AC 273 (appeal taken from Eng.).

unnecessary distraction leading to no changes of substance at all in most instances, whereas the first objection worried that alignment might lead to radical innovations in the common law.

A third criticism is that, even if it turns out that some changes in private law are provoked by the constitutionalization of private law, any such changes will almost certainly make the law worse.<sup>56</sup> Private law has developed through centuries of litigation and judicial examination of different arguments. The courts have carefully weighed competing principles and the pull of different policy objectives in order to construct private law doctrines. The focus on constitutional rights, though important, is only one factor to be taken into account. The danger is that private law will be adjusted by reference to a sole consideration, namely fundamental rights, leading to the devaluation and marginalization of other considerations such as welfare goals and efficiency. The inherited wisdom of the common law might therefore be lost and its doctrines impaired.

A fourth point against constitutionalization raises the question whether it is appropriate to require private individuals to conform to the standards set for governments in constitutions.<sup>57</sup> While it is right, for instance, that governments should treat their citizens with equal concern and respect, it is unclear that such a constitutional legal imperative should be invariably applied to ordinary individuals in their personal dealings with others.<sup>58</sup> Such a requirement of conformity to constitutional standards would involve a considerable interference with individual freedom. Individuals would not be permitted, for instance, to choose their friends solely by reference to their preferences and prejudices, for that latitude might lead to selections that involved discrimination against particular racial groups or members of particular religions. In some special cases, such as recruitment for employment, it may be necessary to interfere with the liberty of employers to be guided by adverse stereotypes of candidates in order to ensure that there is fair opportunity for jobs in the labor market. In such cases, even though they are in most cases private individuals or corporations, employers are co-opted by the state to perform an aspect of its functions, because in practice they are in the best position to secure equal opportunities in the labor market. But that imposition of duties on private individuals and bodies to uphold human rights is the exception. Normally, it is argued under this fourth objection, the law should respect the autonomy and liberty of individuals. They should not be

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<sup>56</sup> Nolan, *supra* note 49; Bagshaw, *supra* note 53.

<sup>57</sup> Hugh Collins, *On the (In)compatibility of Human Rights Discourse and Private Law*, in CONSTITUTIONALIZATION OF EUROPEAN PRIVATE LAW: XXII/2, at 26, 51 (Hans Micklitz ed., 2014).

<sup>58</sup> John Gardner, *Private Activities and Personal Autonomy: At the Margin of Anti-discrimination Law*, in DISCRIMINATION: THE LIMITS OF THE LAW (Bob Hepple & Erika Szyszczak eds., 1992); Hugh Collins, *Discrimination in the Private Sphere*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION (2018).

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required to behave in ways that always conform to constitutional standards. If that proposition is correct, it raises an objection to the constitutionalization of private law, since there is a risk that the alignment of private law will tend to require private parties to be the duty bearers of fundamental rights. In effect that is what happened in *Shelley v. Kraemer*: Mr. Kraemer was required to behave in a non-discriminatory manner even though he (or his predecessors in title) had bought the right to exclude African-Americans from their neighborhood in a valid contract.<sup>59</sup>

A final objection to the constitutionalization of private law raises more profound questions about the architecture of the legal system. While Blackstone rejected a sharp boundary between public law and private law, at least with regard to the application of liberties or fundamental rights, since his time, the vast bureaucratic apparatus of the modern state has developed. The size and reach of the modern state has required the development of modern public law doctrines, including administrative law. Special obligations contained in public law have been imposed on this powerful state machine in order to protect the rights of individuals and to uphold the rule of law. On this view, public law serves different functions from private law. It controls and steers as best we can the rise of the massive power of the state and government. To transplant the legal obligations imposed on the modern state into the field of private law and the legal relations between private citizens would be to overlook these profound differences in the functions of private law and public law. The division between public law and private law is important on this view and should be preserved. That architecture for the legal system should discourage the transplant of fundamental rights into private law. The origin of bills of fundamental rights and liberties lies in the establishment of a constitutional framework to control the exercise of state power.<sup>60</sup> These public law ideas are unnecessary and inappropriate for the realm of private law. Their attempted application would undermine the sharp separation of public and private law, which would lead to confusion about the different purposes of public and private law in a legal system.<sup>61</sup>

Having set out these five serious objections to the constitutionalization of private law, I will now seek to rebut them. My general argument will be that the process of alignment of private law with fundamental rights is in general a benign and welcome development. My estimation is that disruption to private law is likely to be rare and only at the margins. Yet the changes brought about by the process of alignment are likely to be beneficial to private law. When

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<sup>59</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>60</sup> For example, England: Magna Carta Libertatum (1215) and Bill of Rights (1689); France: The Declaration of the Rights of Man and of the Citizen (1789); Virginia: Declaration of Rights (1776); and United States of America: United States Constitution (1789) and Bill of Rights (1789).

<sup>61</sup> Nolan, *supra* note 49.

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fundamental rights are used to modify or develop the doctrines of private law, they will almost certainly enable private law to evolve in ways that make it more consistent with the values of the twenty-first century, including the importance that we attach to liberty and equality. The insertion of the guideposts of fundamental rights into the reasoning of private law may also enable it to resist the totalizing tendencies of considerations of economic efficiency.

#### IV. THE DISTINCTION BETWEEN PUBLIC AND PRIVATE LAW

I will tackle the fifth and the most fundamental listed objection to the constitutionalization of private law first. It is undoubtedly correct that public law and private law perform different functions in general. Transplants from one category to the other certainly require caution and circumspection. But there are also some reasons to think that fundamental rights should be regarded as a special case where the division between public law and private law should not be taken as an absolute barrier to cross-fertilization.

As I have mentioned already, contemporary views of the division of public and private law regard these two branches of the law as performing different functions. Public law controls the actions of government, including its relations between the institutions of the state and its citizens. Private law provides rules to govern the social and economic interactions of private actors. But both public and private law are part of an integrated legal system, not entirely independent rule systems. One might draw an analogy with the close relationship between neighbors who share a common dividing wall between their properties, as in the case of semi-detached houses and some condominiums. Like neighboring families, public and private law function independently. Nevertheless, there are some potential interactions, rather like having noisy neighbors or jointly tackling the need to make repairs to the roof that shelters both properties. Very occasionally, in order to ensure harmonious living together, it may be necessary for the neighbors to enter into dialogue with each other. In other words, the private lawyers may have to take note of some vital interests of the public lawyers that otherwise might be thwarted by private lawyers ignoring their neighbors' complaints. But these would be rare cases where major public law issues were at stake, as in the example of *New York Times v. Sullivan*, where freedom of the press was at risk of being suppressed by extravagant awards of damages for minor errors in criticisms of public officials.<sup>62</sup> On the whole, however, private lawyers prefer to be left undisturbed by their neighbors and to erect good soundproofing that prevents them from hearing claims for fundamental rights.

Although that conventional view of the division between public and private law still provides the dominant view of the architecture of the legal

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<sup>62</sup> See *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

system today, the movement for the constitutionalization of private law often takes a different view of the architecture of the legal systems. This view says that the whole legal system is derived from human rights or fundamental rights.<sup>63</sup> A legal system is founded on the notion that individuals have rights. With that starting point, all the different parts of the legal system evolved. The presence of fundamental rights is like the magma at the core of the earth. From the molten core erupts everything in the planet. In the legal system, everything is derived from this idea that individuals have rights and out of that idea flows various parts of the law. Some of these parts we call property law, some of which we call contract law, and some we call constitutional law, but it is all fundamentally based upon and constructed out of the raw material of individual rights. Using a different metaphor, in Germany the constitutional rights in the Basic Law (or federal constitution) are said to have a radiating effect on all aspects of the legal system, including private law.<sup>64</sup>

One way of expressing these ideas more formally is to say that the bill of rights contained in a country's constitution is not only the highest or supreme law but also the source or origin of all the laws in the legal system. On this view of the architecture of a legal system, since fundamental rights are the source of both public and private law, there is no reason to be concerned about the process of alignment. Indeed, constitutionalization of private law is not properly described as alignment because the requirement is not to duplicate or imitate public law but rather to be true to the origins of private law in the magma of individual rights.

Although the magma theory, as I shall call it, is attractive in the way that it presents private law as being concerned with and derived from individual rights, in the final analysis the claim that all parts of the legal system are derived from the same source of fundamental rights also has to recognize that there is considerable functional differentiation between public law and private law within the legal system. In particular, although the legal system may share a common source in respect for fundamental individual rights, there are three differences between public and private law that always will influence the operation of fundamental rights in the context of private law.

First, there are some fundamental rights that play an important role in public law but tend to play only a marginal role in private law disputes. These are rights that are primarily designed to prevent the abuse of state power, such as powers of seizure and arrest.<sup>65</sup> Another example is the right to a fair trial, which

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<sup>63</sup> Aharon Barak, *Constitutional Human Rights and Private Law*, in HUMAN RIGHTS IN PRIVATE LAW 13, 13 (Daniel Friedmann & Daphne Barak-Erez eds., 2001).

<sup>64</sup> Matthias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006).

<sup>65</sup> See, e.g., U.S. CONST. amend. IV.

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protects citizens against the abuse of the coercive powers of the state.<sup>66</sup> It is true, of course, that citizens have to be able to go to court in private law matters and obtain an effective remedy, as in the case of enforcing contractual or property rights. In some cases the right to a fair trial may assist a private litigant, such as a consumer, to obtain a fairer legal process or a more effective remedy.<sup>67</sup> But in such an example, the right to a fair trial provides a background condition for the effective functioning of a private law system rather than a source for determining the content of the substantive private law rights.

Secondly, fundamental rights may have different meanings according to whether the issue concerns a relationship of a public law kind, such as that between a citizen and the police, or an interaction regulated by private law between private individuals. The ambit and the strength of the right may differ between public and private law. For instance, the state may not be entitled to control various kinds of speech, even if it is extremely offensive to the most powerful of political leaders, because speech in the public law realm is given strong protection and a broad meaning.<sup>68</sup> In contrast, the freedom of speech of employees of a company may be strictly curtailed by the terms of the contract of employment that prevent them from bringing the employer or its products and services into disrepute, and fundamental rights will usually not challenge that restriction on freedom of speech.

The third point that the magma theory must take into account is that invariably in private law cases both sides of the dispute have rights. Whereas in public law cases, the government does not have any fundamental rights because the bill of rights serves the function of protecting the citizen against the government. In private law, however, both parties have rights. For instance, in *Shelley v. Kraemer*, the neighbor has the property right represented by the restrictive covenant, and the purchaser of the property has the right to equal treatment and not be discriminated against on the ground of race.<sup>69</sup> In private law, the competing claims of fundamental rights will always have to be balanced against each other. The issue in public law, instead, is whether any interference with rights is justified by considerations of public policy.

None of these three points undermine the magma theory of the place of fundamental rights in the architecture of a legal system. They merely point out that once the magma has erupted, it is likely to form different geological features according to the issues that have to be addressed. The legal system contains considerable functional differentiation, including the divide between public and private law.

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<sup>66</sup> See, e.g., U.S. CONST. amend. VI.

<sup>67</sup> Case C-34/13, *Kušionová v. SMART Capital a.s.*, (2014) (CJEU) ECLI:EU:C:2014:2189 [65].

<sup>68</sup> See, e.g., U.S. CONST. amend. I.

<sup>69</sup> See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Bearing in mind those points, if a version of the magma theory is broadly correct, it undermines the objection that to introduce fundamental rights into private law would be to attempt to transplant an alien idea into private law that will be disruptive of private law doctrine and mess up the clarity of the architecture of the legal system. On the contrary, if the magma theory is correct, paying attention to individual rights in private law cases will merely serve to help private lawyers remember and reinforce the roots of the various doctrines that provides the rules of private law.

#### V. THE DISRUPTION OF INDIRECT EFFECT

Let me now turn to address the first and second objections to the constitutionalization of private law. In some ways they may be regarded as cancelling each other out. The first objection worries that the process of alignment will lead to a great disturbance in the force of private law, leading to major changes and unpredictability. The second objection insists, on the contrary, that although the process of constitutionalization of private law will likely cause some confusion, when the dust has settled, we will have much the same rules of private law as before. The difference between these points of view depends partly on their differing underlying views about the place of fundamental rights in the architecture of the legal system. Under the first objection, there is a strict separation between public and private law, with fundamental rights located almost exclusively in public law. The second objection tends to embrace the magma view of fundamental rights—that they infuse both public and private law. In addition to those differing orientations, these two objections to the constitutionalization of private law disagree about the likely impact of the process of alignment. This disagreement seems to derive from differing views about the probable operation of what was described above as the indirect effect of fundamental rights in private law.

The second point of view reminds us that constitutionalization does not permit the use of fundamental rights to provide the basis for new causes of action. What it requires, instead, is that existing rules of private law, and the claims they support, should be interpreted in a way that ensures that they conform to fundamental rights. In *New York Times v. Sullivan*,<sup>70</sup> for instance, the newspaper was not bringing a claim for damages for interference with the freedom of the press; it was merely asking the private law courts to develop the law of libel in a way that permitted lively political debate in the newspaper without fear of liability for huge claims in damages for minor errors.<sup>71</sup> In other words, fundamental rights should only be indirectly effective in private law, whereas in

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<sup>70</sup> 376 U.S. 254 (1964).

<sup>71</sup> *See id.* at 264–65.

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public law it is often possible to bring a claim against the government in which protection of the fundamental right is the basis for the cause of action.

The constraint that fundamental rights can only be indirectly effective, provides, to some extent, an answer to the fourth objection to the constitutionalization of private law. In a formal sense, the only duty bearer in private law is the court. The duty is placed on the court to reach a decision that conforms to the fundamental rights. Technically speaking, there was no duty placed on Kraemer to respect the equal protection and property rights of the Shelleys. Yet, it is probably more realistic and convincing to admit that the consequence of the court's ruling was, in effect, to limit Kraemer's property rights by reference to a duty to respect the Shelleys' equal rights. As we shall shortly see, strong versions of the idea of indirect effect make it hard to distinguish between the limitation of the duty to the court and the extension of the duty to private actors.<sup>72</sup>

Given that fundamental rights will only be indirectly effective and not provide the basis for new kinds of legal claims, it may also be argued that the fears about disruption to private law caused by the process of alignment may prove to be exaggerated. In my view, however, though the concerns about disruption caused by the insertion of fundamental rights into private law are sometimes overblown, it is right to be skeptical about the supposed limits on change established by the limitation of the impact of fundamental rights to indirect effect. Indeed, in my view it is often hard to spot any real difference in practical effect between the indirect effect of fundamental rights on private law and the forbidden use of fundamental rights to ground fresh claims. Let me illustrate that contention with some cases involving indirect effect.

My first example involves the development of the tort of privacy in English common law. A claim was brought by Naomi Campbell, a supermodel, against the Mirror Group Newspapers (MGN).<sup>73</sup> They published in their tabloid newspaper a photograph of her leaving a drugs rehabilitation center.<sup>74</sup> Although she had publicly maintained that she did not have a drug addiction problem, this picture proved that contention to be untrue. She could not complain that the newspaper had defamed her because there was no denying the truth of the story. Instead, Campbell claimed that the newspaper had invaded her privacy and in so doing had committed a tort.<sup>75</sup>

The problem with this claim was that no such tort existed at the time. Her claim, therefore, had to use an existing recognized tort known as breach of

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<sup>72</sup> For an exploration of the different strengths of indirect effect, see Alison L. Young, *Mapping Horizontal Effect*, in *THE IMPACT OF THE UK HUMAN RIGHTS ACT ON PRIVATE LAW* 16 (David Hoffman ed., 2011).

<sup>73</sup> *Campbell v. MGN Ltd*, [2004] UKHL 22, [2004] 2 AC 457.

<sup>74</sup> *Id.* at ¶ 2.

<sup>75</sup> *Id.* at ¶ 12.



confidence, which concerns the misuse of information given in confidence.<sup>76</sup> In order to permit her claim to succeed, the UK Judicial Committee of the House of Lords, the predecessor body to the Supreme Court of the United Kingdom, had to change the nature of the tort of breach of confidence in order to extend it to situations where the plaintiff had not given confidential information to the defendant.<sup>77</sup> The tort had to be expanded to apply where the defendant had acquired and disclosed information about the claimant that the claimant would rather remain private and confidential.<sup>78</sup> In order to steer the law towards that development, the court held the tort of breach of confidence should be aligned with Article 8 of the European Convention of Human Rights, especially the phrase the right to “respect for private life,” though the tort should also respect the rights of others, particularly the freedom of the press protected in Article 10.<sup>79</sup> The content of the revised tort would be determined by striking a balance between those two fundamental rights. The final result was that some of Campbell’s claims were successful; in particular, she prevailed against the publication of the picture in the newspaper because the image was regarded as a disproportionate violation of her privacy.<sup>80</sup> Although the court denied creating a new tort (rather it aligned an existing tort with fundamental rights), there is no doubt that prior to this decision, the newspaper would not have committed any legal wrong in publishing a picture of a celebrity in a public place. The case illustrates how the distinction between developing an existing tort through the process of indirect effect and creating a new tort based upon fundamental rights may turn out to be illusory in practice. If so, the concern that the process of alignment of private law with fundamental rights will lead to considerable disruption of the law may prove correct.

The view that constitutionalization is likely to be disruptive is likely to be strengthened by recent developments in the European Court of Human Rights with regard to the interpretation and enforceability of contracts. Consider the problem addressed by the Court in *Pla and Puncernau v. Andorra*,<sup>81</sup> a case arising in Andorra involving a disputed will.<sup>82</sup> An old lady owned land in Andorra.<sup>83</sup> She left the property in her will to her grandchildren, and in the absence of grandchildren, some remote cousins.<sup>84</sup> Her will was interpreted by the

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<sup>76</sup> *Id.* at ¶ 13.

<sup>77</sup> *Id.* at ¶ 14.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at ¶ 16.

<sup>80</sup> *Id.* at ¶ 170–71.

<sup>81</sup> *Pla and Puncernau v. Andorra*, 42 Eur. Ct. H. R. 25 (2006).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at ¶ 12–13.

<sup>84</sup> *Id.* at ¶ 11–13.

Andorran court to exclude the person who appeared to be her grandson on the grounds that he had been adopted rather than being born to the son of the testator.<sup>85</sup> The adopted child complained to the European Court of Human Rights in Strasbourg that when interpreting the will, the Andorran courts had discriminated against him by not treating him equally.<sup>86</sup> The Court agreed that since the will was not absolutely explicit about the exclusion of adopted children, it must be interpreted in a way that is consistent with human rights, which in this case would permit the adopted grandson to inherit the property.<sup>87</sup> Assuming that the Andorran court was correct about the testator's intention to restrict the inheritance to her blood line, what the European Court of Justice did was to rewrite the will to conform to fundamental rights concerned with equal protection of the law.<sup>88</sup>

That approach to interpretation of legal documents in private law was taken even further in *Bărbulescu v. Romania*.<sup>89</sup> In this case, an employer had issued strict instructions and a code of conduct that employees should not use social media on the firm's IT equipment during working time except on the firm's business.<sup>90</sup> The employer stressed that breach of this rule would be sanctioned by dismissal.<sup>91</sup> Mr. Bărbulescu used the firm's IT equipment to send messages on Yahoo to his fiancé during working hours.<sup>92</sup> The employer discovered this breach of the rule not only by monitoring the destination of the messages sent, but also by reading and printing out these personal messages.<sup>93</sup> The employee's claim for unfair dismissal failed before the Romanian courts because his breach of the employer's disciplinary code was undisputed.<sup>94</sup> Before the European Court of Human Rights, however, the issue was viewed through the framework of Article 8 and its protection of the right to privacy with respect to correspondence.<sup>95</sup> The Court criticized the decision of the Romanian court on two grounds.<sup>96</sup> First, it said that the employer had interfered with the employee's right to privacy because it had not made it clear in advance that it would not only monitor the destination of messages, but also read these personal messages and

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<sup>85</sup> *Id.* at ¶ 18.

<sup>86</sup> *Id.* at ¶ 19.

<sup>87</sup> *See id.* at ¶ 1–6.

<sup>88</sup> *Id.* at ¶ 59–62.

<sup>89</sup> *Bărbulescu v. Romania*, 754 Eur. Ct. H. R. (2017).

<sup>90</sup> *Id.* at ¶ 11–12.

<sup>91</sup> *Id.* at ¶ 15.

<sup>92</sup> *Id.* at ¶ 18–21.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at ¶ 28.

<sup>95</sup> *Id.* at ¶ 69.

<sup>96</sup> *Id.* at ¶ 78–81.

make them public in court proceedings. The contract should be interpreted restrictively to protect the employee's right to privacy as far as possible. Second, going even further, the Court insisted that employers could not remove the right to privacy of communications entirely in the workplace: "an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary."<sup>97</sup> The implication of this second ground for upholding Mr. Bărbulescu's claim is that in whatever manner an employer may draft its contract of employment, terms that seek to exclude the ability of workers to have private communications with friends and family during the working day are likely to be held to be unenforceable, unless the employer can demonstrate such restrictions on communications to be necessary for a legitimate business purpose.<sup>98</sup>

These two decisions of the European Court of Human Rights, with regard to the interpretation of legal documents, try to stay within the framework of only aligning private law with fundamental rights indirectly. The Court presents its decisions as adopting the method of interpreting these legal documents in such a way as their content conforms to the standards of the Convention on human rights. The idea of indirect effect, in this context, is that in the case of ambiguity in the meaning of a legal document, such as a will or a contract, the interpretation that accords best with respect for human rights should be favored. The problem in these two decisions is that the ambiguity in the written document was rather manufactured by the Court. In *Pla and Puncerno*, the Andorran court read the will as unambiguously excluding the adopted grandson, no doubt at least in part because the legal process of adoption was unknown to Andorran law, so that it seemed unlikely that the testator had intended to include an adopted child in her will.<sup>99</sup> In *Bărbulescu*, the employer's rule book was comprehensive and didactic in his prohibition on personal communications.<sup>100</sup> It is true that the contract did not explicitly state that the employer would read those personal communications, but the Romanian courts reasonably supposed that employees would understand that the employer would read such messages in order to confirm that its rules had been broken. To suggest, as the European Court of Human Rights did, that employees might still have a reasonable expectation that the employer would not actually read these personal messages runs counter to the whole tenor of the employer's bombastic and oppressive disciplinary code.

If it is correct to claim that the ambiguities in these legal documents were to a considerable extent invented by the Court, it becomes apparent that the

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<sup>97</sup> *Id.* at ¶ 80.

<sup>98</sup> *Id.* at ¶ 120.

<sup>99</sup> *See Pla and Puncernau v. Andorra*, 42 Eur. Ct. H. R. 25 (2006).

<sup>100</sup> *See Bărbulescu v. Romania*, 754 Eur. Ct. H. R. (2017).

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technique of indirect effect is, rather, more radical than its proponents may suggest. In these cases, the European Court of Human Rights placed constraints on freedom of contract and freedom to dispose of one's property through gifts by trying to ensure that these expressions of agreement conform to the demands of the Convention on Human Rights. The full strength of these interventions is revealed in *Bărbulescu* when the Court appears to say, in the passage quoted, that it will not permit such strict controls over the right to privacy, unless the employer can justify them as necessary in the pursuit of a legitimate business aim.<sup>101</sup> Although the Court maintains its formal position that it is merely giving indirect effect to fundamental rights in the context of private law disputes, the result seems to be that employers cannot use their contracts to place unnecessary constraints on their employee's Convention rights and freedoms. That development appears to move beyond interpretation of contracts to the regulation of employment relations.

My conclusion is, therefore, that the method of aligning private law with fundamental rights by giving indirect effect to fundamental rights can function in quite a disruptive way. It can challenge basic principles of private law, such as freedom of contract, in order to secure the protection of other fundamental rights. Furthermore, the prohibition on the creation of new causes of action in private law is revealed in cases such as *Campbell v. MGN Ltd* as imposing an illusory limitation. The difference between creating an entirely new claim in tort and reformulating an old cause of action that has a broader scope of application is surely a casuistic distinction. The first concern about constitutionalization—that it creates risks of disruption to the certainty of private law rules caused by alignment of private law with fundamental rights—seems to have considerable substance to it. The question remains, however, whether this potential disruption is undesirable.

## VI. THE BENEFICIAL EFFECTS OF CONSTITUTIONALIZATION

The issue is whether the undoubted disruptive effects of the constitutionalization of private law are outweighed by the benefits alignment brings to private law. Although creating uncertainty in private law is in general undesirable, there are times when the law needs to evolve, modernize, and adapt to modern conditions. For instance, legal rules that were once regarded as fair in a hierarchical and patriarchal society may seem untenable and unwelcome in a modern democracy. Can the alignment of private law with fundamental rights be regarded as a welcome tool of modernization of this kind because it enables the judges to question whether the existing rules adequately reflect the values and practical requirements of the contemporary world? Or, should we regard the insertion of fundamental rights into private law as an unnecessary and confusing

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<sup>101</sup> *Id.* at ¶ 80.

intervention because private law is perfectly capable of evolving in tune with society without outside help? Those who view the constitutionalization of private law as, in general, a beneficial development usually points to two consequences of the alignment of private law with fundamental rights.

In the first place, what emerges reasonably clearly from the few cases that I have discussed is that the process of alignment of private law with fundamental rights tends to nudge private law in a liberal direction. The fundamental rights frame the issues in terms of protections for liberties or for equal concern and respect under the law. In *Shelley v. Kraemer*, the law of restrictive covenants was modified so that it cannot be used as a tool for race-based exclusions from occupying or owning property.<sup>102</sup> The decision in *New York Times v. Sullivan* gave strong protection for freedom of the press, especially when the press is critically evaluating the performance of public officials as part of the democratic process.<sup>103</sup> The decision in *Bărbulescu v. Romania* challenged an employer's power to use the contract of employment to impose a regime of such total control over employees' behavior that it prevents individuals from having a fulfilling personal life.<sup>104</sup> Liberals are likely to welcome those decisions; whereas others may prefer private law to adopt a more conservative orientation.

Secondly, it is sometimes argued that the constitutionalization of private law is likely to help the "have-nots" against wealthy and powerful individuals.<sup>105</sup> In some cases, the indirect effect of the protection of fundamental rights may certainly help weaker parties in their market transactions. In a famous German case,<sup>106</sup> for instance, a bank that had required a young woman to sign a guarantee for her father's loan from the bank was prevented from enforcing the guarantee because at the time the guarantee was signed, there was no possibility that she would ever be able to meet the obligation to repay the debt, so the father's default would plunge her into penury for the rest of her life.<sup>107</sup> Although the German private law courts had enforced the guarantee against the hapless young woman, the German Federal Constitutional Court regarded this transaction as one that undermined the dignity and autonomy of the individual, so that it should not be

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<sup>102</sup> See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>103</sup> See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>104</sup> See *Bărbulescu v. Romania*, 754 Eur. Ct. H. R. (2017).

<sup>105</sup> See OLHA O. CHEREDNYCHENKO, *FUNDAMENTAL RIGHTS, CONTRACT LAW AND THE PROTECTION OF THE WEAKER PARTY* (2007).

<sup>106</sup> BVerfG, 1 BvR 567/89, Oct. 19, 1993, BVerfGE 89, 214. For a brief summarization of this case in English, see UNIVERSITY OF GRONINGEN, *PARTY AUTONOMY AS A FUNDAMENTAL RIGHT IN THE EUROPEAN UNION* 306–07 (2010), [https://www.rug.nl/research/portal/files/14867116/Party\\_Autonomy\\_as\\_a\\_Fundamental\\_Right\\_in\\_the\\_European\\_Union\\_European\\_Review\\_of\\_Contract\\_Law\\_2010\\_303\\_318.pdf](https://www.rug.nl/research/portal/files/14867116/Party_Autonomy_as_a_Fundamental_Right_in_the_European_Union_European_Review_of_Contract_Law_2010_303_318.pdf).

<sup>107</sup> BVerfG, 1 BvR 567/89, Oct. 19, 1993, BVerfGE 89, 214.

enforced.<sup>108</sup> The case certainly illustrates a situation where a weaker party is pressed by the stronger party, in this case both her father and the bank, into making an extremely unfavorable transaction. There has been a similar pattern with respect to the protection of the fundamental rights of workers against interference by employers. In Europe, the European Court of Human Rights has protected the freedom of workers to join trade unions and to take part in associated activities such as collective bargaining.<sup>109</sup> It has also protected domestic workers and others from treatment that amounts to human trafficking and modern slavery.<sup>110</sup> Such decisions appeal to those who believe that private law ought to do more to assist and protect people who are typically the weaker parties to transactions, such as consumers, employees, and tenants.

In my view, however, there is no inherent tilt in the legal protection of fundamental rights that favors weaker parties. Stronger parties have fundamental rights as well and they should be equally well protected by the courts. In *McDonald v. McDonald*, we saw how the bank's interest in foreclosing on the mortgage and evicting the tenant was protected as part of the fundamental right to property.<sup>111</sup> The weaker party's right based on the protection of the right to a home was a significant limitation on that property right, but ultimately it was satisfied by the landlord following the procedure for giving notice set out in legislation. Similarly, in employment cases, though workers' fundamental rights have been protected, the European Court of Justice has protected an employer's freedom to conduct a business, which can protect an employer against what the court may regard as excessive protection for workers' rights.<sup>112</sup> Although there may be no inherent tilt in the protection of fundamental rights in favor of weaker parties, what may be true, of course, is that in practice stronger parties are more likely to run roughshod over others' fundamental rights because they expect to be able to get their own way. To that extent, the constitutionalization of private law is likely to be of greater assistance to weaker parties in a practical way.

## VII. THE RULE OF LAW

In this analysis of the movement in legal reasoning in favor of the constitutionalization of private law, we have considered a number of objections to the alignment of private law with fundamental rights. It has been conceded that some disruption may be caused to existing private law doctrines, but it has

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<sup>108</sup> *Id.*

<sup>109</sup> See *Demir and Baykara v. Turkey*, 1345 Eur. Ct. H. R. (2008); *Wilson v. United Kingdom*, 552 Eur. Ct. H. R. (2002).

<sup>110</sup> *Siliadin v. France*, 545 Eur. Ct. H. R. (2005).

<sup>111</sup> See *McDonald v. McDonald*, [2016] UKSC 28, [2017] AC 273 (appeal taken from Eng.).

<sup>112</sup> See *Case C-426/11, Alemo-Herron v. Parkwood Leisure Ltd.*, ECLI:EU:C:2013:521 [2014] 1 CMLR 21, [2013] ICR 1116.

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been suggested that these challenges are likely on the whole to serve worthwhile purposes of modernizing private law. Furthermore, it has been accepted that in most cases, the insertion of fundamental rights into private law is unlikely to provoke any change because private law is itself derived at least in part from the magma of individual rights. Despite these assurances, there will undoubtedly be many private lawyers who will remain concerned about the potential disruption caused to private law. A popular and well-founded view is that clear and stable rules of private law are needed by business and commerce in order to flourish. The ability of courts to revise the doctrines of private law by reference to abstract concepts, such as privacy and freedom of speech, creates, on this view, an undesirable degree of uncertainty that should be avoided. The great strength of the common law, it is often said, is that it is stable, rule-bound, and highly predictable, unlike European civil law systems, where overriding principles of good faith and good morals function to create unpredictable exceptions to the rules of contract, tort, and property. If the common law were to permit fundamental rights to overturn settled doctrines, it may be feared that the common law would lose its alleged competitive edge over other legal systems.

Although the concerns about the disruptive potential of alignment with fundamental rights have some validity, I suggest in conclusion that these concerns presuppose a view of the Rule of Law that is implicitly challenged by the movement for the constitutionalization of private law. In the opening essay of his book *A Matter of Principle*, Ronald Dworkin advanced the thesis that there are two possible conceptions of the Rule of Law.<sup>113</sup> He drew a distinction between the rule-book version of the Rule of Law and a rights-based version of the Rule of Law.<sup>114</sup> He drew this distinction for the purpose of arguing that judges are not necessarily engaging in inappropriate political activity when they are being activists and not following the rules of law strictly according to the literal meaning, provided that they are upholding the rights of individuals. Whatever the merits of that broader argument about the appropriate role of judges, for my purpose what is crucial is to appreciate the dichotomy between a rule-based conception of the Rule of Law and a rights-based version because it is the switch from the former to the latter that is contained within the movement for the constitutionalization of private law.

According to Dworkin, the rule-book conception of the Rule of Law

insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all. The government as well as ordinary citizens must play by these public rules until they are changed, in

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<sup>113</sup> Ronald Dworkin, *A MATTER OF PRINCIPLE* 9 (1986) [hereinafter *Political Judges*].

<sup>114</sup> *Id.* at 11.

accordance with further rules about how they are to be changed, which are also set out in the rule book.<sup>115</sup>

The rule-book conception of the Rule of Law is obviously indebted to the work of H.L.A. Hart,<sup>116</sup> and in its expression of the importance of freedom from arbitrary power, it is closely affiliated to what has become known as the republican conception of liberty.<sup>117</sup>

In Dworkin's second conception of the Rule of Law, the rights conception that he favors, citizens are regarded as having moral and political rights, which must be respected by positive law.<sup>118</sup> Courts must, therefore, uphold those rights so far as is practicable. "The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights."<sup>119</sup> Dworkin clarifies that under this rights conception of the Rule of Law, judges should, in general, follow the positive rules of law that have been laid down in advance; otherwise, judges would be likely to be acting unfairly, unjustly, and in a way that defeats existing rights.<sup>120</sup> The rights conception of the Rule of Law requires judges to enforce the law according to its plain meaning because those transparent rules usually express an accurate public conception of individual rights. But there will be cases, known as hard cases, where it will be necessary to depart from existing rules of law, even though those rules contain prima facie evidence of what rights people have, in order to uphold the true rights of citizens properly and accurately.<sup>121</sup> In his subsequent book, *Law's Empire*,<sup>122</sup> Dworkin explained how a hypothetical and super-human judge known as Hercules should carry out this task of ensuring that he always reaches the right answer by producing in his interpretation of the law an accurate conception of the rights of citizens.<sup>123</sup>

In my view, much of the force of the criticisms of the disruptive potential of the constitutionalization of private law draw their strength from an implicit reliance upon the rule-book conception of the Rule of Law. While the attachment to upholding the formal rules of law has many merits, as Dworkin acknowledges, slavish adherence to the rules is not necessarily going to lead to fair results and

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<sup>115</sup> *Id.*

<sup>116</sup> H.L.A. Hart, *THE CONCEPT OF LAW* (1961).

<sup>117</sup> See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997); Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, in *REPUBLICANISM AND POLITICAL THEORY* 83, 83–89 (Cecile Laborde & John Maynor eds., 2008).

<sup>118</sup> Political Judges, *supra* note 113, at 11.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 11–12.

<sup>121</sup> *Id.* at 9.

<sup>122</sup> RONALD DWORKIN, *LAW'S EMPIRE* (1986).

<sup>123</sup> *Id.* at 239.



justice for the parties. The rights-based conception of the Rule of Law allows for the possibility of modifying the settled rules of law in hard cases where it is necessary to adjust the law in order to protect a coherent conception of the rights of individuals under the constitution. In other words, the movement for the constitutionalization of private law appears to presuppose something close to Dworkin's rights-based conception of the Rule of Law. From that perspective, far from some disruption to settled rules of private law being a problem, it is a sign that the rights-based conception of the Rule of Law is flourishing.