2015

A Comparative Look at America's Pastime

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Fall 2013

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INTRODUCTION

While an American law student might be surprised to learn the Constitution does not protect against private invasions of her rights, state action is hardly a glamorous topic today. Although state action had its day in the comparative spotlight, it is far a feel from a hot button issue in the modern legal community. It is not often relevant whether a constitution applies across the public-private divide ("direct horizontal effect") or if it applies only to public, government or state action and not to private conduct ("state action" or "vertical effect"). This is because when a constitution requires state action erecting the public-private divide, other sources of private law usually fill in the gaps. American history shows that even if private law was slow to fill these gaps, now, the states generally have it covered.

Accordingly, finding a legal mind today that wants to discuss the state action doctrine is about as easy as finding a baseball fan who wants to talk about performance enhancing drugs ("PEDs")[1] and the unsympathetic struggle of Alex Rodriguez ("A-Rod"). More than eight years of PEDs related communications saturating the media has rendered the topic stale at best. New York Yankees fans generally do not feel bad that A-Rod currently is in arbitration appealing his 211-game suspension from Major League Baseball ("MLB") for alleged use of PEDs. That said, this paper attempts to use these otherwise exhausted and apathetic topics —state action and A-Rod's appeal of his suspension from MLB for PEDs —to revitalize interest in each other.

The goal is to show that this may just be one of those rare moments when it matters that the American Constitution does not reach private actors. Usually, it does not matter that the

[1] PEDs includes, in addition to other substances: (i) any and all anabolic androgenic steroids categorized as a Schedule III Controlled Substance; (ii) certain hormones and agents with antiestrogenic activity; and (iii) any substances not covered by Schedule III, but otherwise covered under (i) and (ii) that are illegal in the United States, e.g. "designer steroids." MLB's Joint Drug Prevention and Treatment Program ("Joint Drug Agreement" or "JDA"), p. 7, ¶ 2B.

Constitution does not protect against private acts because the states' laws and constitutions give people this protection. But, sometimes, it does matter. It matters when there is a hole in the gap-filling law that leaves victims of certain private infringement with no form of protection. Arguably, one such hole in American law could allow MLB to deprive A-Rod of his legitimate property interest in continued employment with the Yankees without procedural due process in violation of the 14th Amendment. This paper simply shows how other constitutional models cover this putative hole left by American state action and could offer A-Rod some protection.

To this end, Part I of this paper explains the leading models of state action by identifying specific countries as examples to discuss constitutional text and relevant case law underlying each model. It concludes by giving the typical justifications for the comparative models. This should familiarize the reader with how the courts apply each model to a given situation.

Part II provides the factual framework for A-Rod's hypothetical claim that upholding his 211-game suspension based on the current arbitration would deprive him of his protected property interest in continued employment with the Yankees without procedural due process. It then applies the comparative models from Part I to this factual backdrop to illustrate the probable outcomes under each model of state action.

Part III concludes that A-Rod's case and his hypothetical procedural due process claim against MLB provide a modern example of a rare time when it makes a real difference that our Constitution does not reach purely private actions, however inhumane.

I. COMPARATIVE MODELS OF STATE ACTION

1. Direct Horizontal Effect: The Constitution Binds Everyone

Constitutions with direct horizontal effect apply across the public-private divide creating affirmative duties for everyone.[2] There is no distinction in the application of constitutional law between government and private actors. This is because constitutions with direct horizontal effect protect against any action—public or private—that impermissibly infringes upon an individual's fundamental rights and liberties. The Irish Constitution has direct horizontal effect because it directly applies across the board (or the horizon) to all allegedly violative actions.

A. The Underpinnings: Textual Sources and Key Case Law

(i) Ireland

The Irish Supreme Court has interpreted certain rights provisions in its constitution to have horizontal effect directly binding both private individuals and state actors.[3] For example, the courts have sustained private causes of action against other individuals for violating one's constitutional right to earn a livelihood[4] and the right to due process.[5]

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[2] Stephen Gardbaum, The "Horizontal Effect" of Constitutional Rights, 102 Mich. L. Rev. 387, 395 (2003).

[3] Andrew S. Butler, Constitutional Rights in Private Litigation: A Critique and Comparative Analysis, 22 Anglo-Am. L. Rev. 1, 18 (1993) ("While the Irish Supreme Court has not adopted a categorical position on the general question, it seems clear that the constitutional guarantees of the Bunreacht are applicable to private litigation.").

[4] See, e.g., Lovett v. Gogan, [1995] 1 I.L.R.M. 12 (recognizing the fundamental right to earn a livelihood and a constitutional claim against a private employer for alleged infringement of that right); Parsons v. Kavanagh, [1990] 10 I.L.R.M. 560 (Ir. H. Ct.) (granting an injunction against a defendant unlicensed transport company found to be interfering with the plaintiff licensed transport company's constitutional right to earn a livelihood).

[5] Glover v. B.L.N., Ltd., [1973] 1 I.R. 388 (Ir. H. Ct.) (awarding damages to a plaintiff for violation by defendant employer of constitutional right to fair procedures implied into employment contract permitting dismissal for just cause)).

The Bunreacht states, "[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."[6] The Irish Supreme Court has read this provision as imposing an express constitutional duty on the State "to pursue and realize the protection and vindication of constitutional rights" against both public and private invasions.[7] The "State" encompasses each vital arm of the tripartite government: the Executive, the Legislature, and the Judiciary.[8] This means the Irish judiciary has a positive duty "to protect and enforce the rights of individuals and the provisions of the Bunreacht in proceedings before them."[9]

In fulfilling this duty, the Irish Supreme Court has read the Bunreacht as conferring a private right of action for breach of constitutionally protected rights.[10] This allows a person to bring a constitutional tort claim against another private actor based directly on the Bunreacht for interfering with a constitutional right that the private law does not protect.[11] "[I]f a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a

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[6] Ir. Const., 1937 ("The Bunreacht"), art. 40.3.1.

[7] Butler, supra, at 21 ("This clause does not limit the obligation 'to defend and vindicate' to invasions made by the State, and so the courts have held it to represent a pledge to defend and vindicate against any invader, whether public or private.").

[8] Id.

[9] Id. at 18 & n. 37 ("[T]he judiciary has a positive obligation to interpret and develop the law in a way which is in harmony with the philosophy of the [Bunreacht].") (citing B.L. v. M.L., [1989] I.L.R.M. 528 at p. 542).

[10] J.P. Hosford v. John Murphy & Sons, [1987] I.R. 621, 626 ("Uniquely, the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials.").

[11] Pierce trading as Swords Memorials & Anor v The Dublin Cemeteries Committee & Ors, [2006] IEHC 182 (H. Ct.) (Ir.) (finding plaintiff has "a constitutional right to earn his living" and has standing to sue a private corporation for violating that right if there is "no other way in which the plaintiff can protect the right he asserts and contends is being and will continue to be infringed. . . .").

constitutional right, that person is entitled to seek redress against the person or persons who infringed that right."[12]

For example, "the constitutional right to earn one's livelihood by any lawful means carries with it the entitlement to be protected against any unlawful activity on the part of another person or persons which materially impairs or infringes that right."[13] The Bunreacht thus confers a positive right to earn a living on all persons.[14]

In addition, the Irish Constitution entitles every employee to procedural due process protection.[15] The Court has held that it is an employer's constitutional duty to ensure "that the rules of natural and constitutional justice would be applied" to determining if an employee should be terminated for alleged gross misconduct.[16] Where [t]he procedures and conduct of the investigation adopted by the Defendant were flawed and of basic unfairness for several reasons," the Court demanded the employee get a hearing that satisfies procedural due process demands.[17] The Court refused to draw a public-private distinction in the distribution of constitutional protections of fundamental rights and liberties.

B. Justifications for Direct Horizontal Effect: Fraternity and Social Democracy

A leading justification for constitutions with direct horizontal effect[18] is solidarity or fraternity.[19] This is the idea that every member of the society has the same duty to take the

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[12] Meskell v. Coras Iompair Eireann, [1973] I.R. 121, 133.
[13] Pierce, (citing Parsons v. Kavanagh, [1990] 10 I.L.R.M. 560 (Ir. H. Ct.)).
[14] Pierce, (citing Parsons v. Kavanagh, [1990] 10 I.L.R.M. 560 (Ir. H. Ct.)).
[15] Cassidy v. Shannon Castle Banquets, [1999] IEHC 1691 (H. Ct.) (Ir.).
[16] Id.
[17] Id.
[18] Note that, in effort to expand the limited reach its Interim Constitution, South Africa's Final Constitution gives direct horizontal effect to certain rights provisions. For example, section one provision "binds a natural or juristic person if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right." S. Afr. Cont. ch. 2 (Bill of Rights), § 8(2) (1996). Another imposes a constitutional duty on private individuals

interests of one another into account. The constitution identifies fundamental interests and then requires everyone to consider such interests in their public and private capacities. The Irish courts have a constitutional duty "to protect and enforce the rights of individuals and the provisions of the Bunreacht in proceedings before them."[20] This includes the duty to ensure that private law conforms to and abides by the Bunreacht.[21] Irish common law is subject to constitutional scrutiny to the extent it conflicts with the Bunreacht, the supreme law of the land.[22] As supreme, the Bunreacht sees no public-private divide in its distribution of protections.[23]

One of the main arguments favoring direct horizontal effect reflects a common criticism of state action: private interactions need constitutional regulation too![24] The idea is that powerful private actors and institutions are just as much of a threat to individual constitutional rights as government actors. This social democratic concern is about market actors exercising effective social power by controlling valuable social resources such as property and employment opportunities.[25] The argument is that the power of a private employer to deprive someone of the

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not to "unfairly discriminate directly or indirectly against anyone on one or more" of the following grounds: "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." Id. at § 9(3), (4).

[19] Tushnet, supra, at 90.

[20] Butler, supra, at 18.

[21] Id. at 19 (explaining that because the courts have a positive duty to protect individual rights, "interpersonal disputes are equally open to a constitutional dimension, and it matters not that the particular legal rule in question is a common law one.").

[22] Id. ("The Constitution, as the basic law of the state and of the government of the state, controls the statute law and the common law. In the Case of any conflict arising, the courts must apply the superior of these laws, namely, the Constitution.") (citing B. Walsh, The Constitution: a view from the Bench, in B. Farrell, De Valera's Constitution and Ours, (Dublin: Gill Macmillan, 1988) 188 at p. 191.

[23] Id. ("Because the Bunreacht is the supreme law of the land, the Courts regard the Bunreacht as always speaking.").

[24] Gardbaum, supra, at 395.

[25] Tushnet, supra, at 90.

opportunity to earn a living "poses as great a threat to liberty as does the power to throw someone in prison.[26]"

2. Indirect Horizontal Effect: The Constitution Binds State Actors and Influences The Law Governing Private Litigation

A constitution with indirect horizontal effect directly governs state actors and indirectly regulates private actors by shaping the law that applies in private litigation.[27] Such a constitution does not directly effect private *actors*, but it directly effects the private *law* that courts apply in disputes between private parties.[28] Courts have a duty to develop private law consistent with the values protected by the constitution, but private actors are not bound directly by the constitution.

A. The Underpinnings: Textual Sources and Key Case Law

(i) Canada

The Canadian Supreme Court is widely acknowledged to have adopted a general position of indirect horizontal effect on the scope with respect to the 1982 Charter of Fundamental Rights and Freedoms ("Charter").[29] It draws a distinction between constitutional rights and constitutional values, requiring "governmental action" to trigger constitutional rights and empowering courts to develop the common law in line with the constitutional Charter values.[30]

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[26] Mark Tushnet, The Issue of State Action/Horizontal Effect in Comparative Constitutional Law, 1 Int'l J. Const. L. 79, 90 (2003).
[27] Gardbaum, supra, at 398 ("In essence, this intermediate or hybrid position is that although constitutional rights apply directly only to the government, they are nonetheless permitted to have some degree of indirect application to private actors.").
[28] Tushnet, supra, at 94 ("[T]he constitution *does* apply to the legal rules applied by the courts in disputes between private parties.").
[29] Gardbaum, supra, at 398.
[30] Id.

In Dolphin Delivery,[31] a private company sought and obtained an injunction under the common law of inducing breach of contract to restrain the secondary picketing of its premises by a trade union.[32] The union argued that the picketing was protected speech under the Charter's guarantee of freedom of expression, invoking both the "Supremacy Clause" of Section 52(1) and the "Application Clause" of Section 32(1).[33] The Supremacy Clause states that the Charter is "the supreme law of Canada, and any law that is inconsistent with the provisions of the C[harter] is, to the extent of the inconsistency, of no force or effect."[34] The court found the text of this provision eliminated any doubt that the Charter governs common law.[35]

The court also found the Application Clause clearly answered the separate question of whether the Charter applies to private litigation.[36] This Clause renders the Charter applicable "to the Parliament and government of Canada in respect of all matters within the authority of Parliament . . . and . . . to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."[37] The court adopted the "standard use meaning of government" as "the executive branch only."[38] As a result, the Charter does not apply to private actors or to the courts.[39] Rather, the Charter only governs common law

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[31] Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 (Supreme Court of Canada).
[32] Gardbaum, supra, at 398.
[33] Id. at 398-99.
[34] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) ("Charter"), § 52(1).
[35] Dolphin Delivery, [1986] 2 S.C.R. at 592 (finding "there can be no doubt" that the Charter governs the common law).
[36] Dolphin Delivery, [1986] 2 S.C.R. 573.
[37] Charter, § 32(1)(a).
[38] Gardbaum, supra, at 399 (citing Dolphin Delivery).
[39] Id.

that forms the basis of some legislative or executive action.[40] A court order without more does not constitute "official action" rendering the Charter applicable to private common law suits.[41]

Nonetheless, the court made clear that this does not render the Charter entirely irrelevant in such private litigation:

> Where . . . private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences between individuals.[42]

While Charter rights impose duties only on government actors, Charter values influence the entire legal system.[43]

There is a private cause of action if government conduct allegedly breaches an express constitutional duty by abrogating a given individual Charter right.[44] The Charter text that imposes the particular government duty also creates the private cause of action.[45] Alternatively, because the Charter does not impose constitutional duties on private individuals, it does not

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[40] Gardbaum, supra, at 399 ("[S]uch as prosecution reliance on a common law evidentiary rule.").

[41] Id. at n.49 ("By contrast, the Charter applies, according to the court, in private litigation relying on a statute rather than the common law. It gave the example of Re Blainey and Ontario Hockey Ass'n, [1986] 26 D.L.R. (4th) 728, in which a twelve-year-old girl successfully sued a private hockey association that excluded her from playing on a boys' team on the basis that Section 19(2) of the Ontario Human Rights Code relied on by the defendant violated the Charter's sex discrimination provisions.") (citing Dolphin Delivery, [1986] 2 S.C.R. at 603).

[42] Gardbaum, supra, at 399-400 (citing Dolphin Delivery, [1986] 2 S.C.R. at 605).

[43] Gardbaum, supra, at 400.

[44] Id. ("Where a party alleges that legislative or executive action violates the Charter, a cause of action has its source in that Charter right.") (citing Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130).

[45] Id. at 400.

create a concomitant cause of action for private conduct that allegedly violates a Charter right.[46] Private individuals instead must rely on existing common law claims to redress such harms because courts must "not . . . expand the application of the Charter beyond that established by [the Application Clause] . . . by creating new causes of action."[47]

The Charter right-value dichotomy also informs the parties' respective burdens of proof in each kind of case. In a suit alleging that state action violates a Charter right, once the private individual proves a prima facie violation of a right, the burden shifts to the government to justify its actions.[48] In private litigation, the party challenging the common law must prove that the common law is not consistent with Charter values and that its provisions cannot be justified.[49]

(ii) Germany

Apparently the provisions of the 1949 Basic Law of the Federal Republic of Germany ("Basic Law") relevant to state action are largely ambiguous because typically they are expressed in declaratory and universalistic terms.[50] Germany, like other civil law countries, distinguishes public from private law to a far greater degree than do common law jurisdictions.[51] Private law is codified in a comprehensive series of subject-matter codes and is adjudicated by separate hierarchies of specialized civil courts. These special civil courts are distinct from the two most important public law courts, the Federal Administrative Court and the Federal Constitutional Court ("FCC").[52]

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[46] Gardbaum, supra, at 400 ("In the context of a legal dispute between private parties . . . in which the consistency of the common law with Charter values becomes relevant, the Charter creates no new cause of action because private parties owe each other no constitutional duties.").
[47] Hill, [1995] 2 S.C.R. at 1170-71 ("Far-reaching changes . . . must be left to the legislature.").
[48] Id. at 1172.
[49] Gardbaum, supra, at 400 (citing Hill, [1995] 2 S.C.R. at 1172).
[50] Id. at 401.
[51] Id.
[52] Gardbaum, supra, at 401.

Basic Law rights form "an objective order of values"[53] that centers upon "human dignity and the free unfolding of personality within the social community."[54] The courts must look at this value system "as a fundamental constitutional decision affecting the entire legal system" that naturally influences private law as well."[55] As such, "no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."[56]

This means that the German constitution applies directly to public law and, under Lüth, applies indirectly to private law.[57] For example, because the producers' suit in Lüth was a 'private' law action, his constitutional speech rights only applied indirectly in the case.[58] In this type of private law action, as in all types of private law actions, constitutional principles 'influence' the norms of private law but do not completely supersede them."[59]

(iii) The Republic of South Africa

The South African constitutional court held that the Bill of Rights, under the Interim Constitution, should be influential in developing the common law governing private interpersonal relations without having direct horizontal effect.[60]

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[53] Lüth, 7 BVerfGe 198 (1958) (refusing to give the Basic Law's protection of free expression direct horizontal effect).
[54] Lüth, 7 BVerfGe 198 (1958) (refusing to give the Basic Law's protection of free expression direct horizontal effect).
[55] Lüth, 7 BVerfGe 198 (1958) (refusing to give the Basic Law's protection of free expression direct horizontal effect).
[56] Id.
[57] Gardbaum, supra, at 401.
[58] Id. (citing Peter E. Quint, Free Speech and Private Law in German Constitutional Theory, 48 Md. L. Rev. 247, 264 (1989)).
[59] Peter E. Quint, Free Speech and Private Law in German Constitutional Theory, 48 Md. L. Rev. 247, 264 (1989)).
[60] Gardbaum, supra, at 400-01 & n.56 ("In Du Plessis v. De Klerk . . . 1996 (3) SA 850 (CC) . . . a majority of the South African Constitutional Court held that although the Constitution's Bill of Rights neither had 'general direct horizontal application' nor applied in private litigation based on the common law, it nevertheless may, and should, have an influence on the development of the common law governing relations between individuals.")

The Interim Constitution included the Charter's Application Clause.[61] This provision stated, "[i]n the interpretation of any law and the application and development of common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."[62]

Another provision supplemented a finding of indirect horizontal effect, providing it "shall bind all legislative and executive organs of the state at all levels of government."[63] This limited constitution was controversial in the wake of apartheid, so the Final Constitution has a provision that reaches private action interfering with basic human dignities, rights and liberties.[64]

B. Justifications for Indirect Horizontal Effect

The hybrid indirect horizontal effect model borrows justifications from the models at the polar ends of the state action spectrum. Proponents of this model argue that the intermediate position allows the constitution to directly bind state actors and also has "some degree of indirect application" to private actors. Arguably, this position is the best of both worlds: the constitution can fill gaps while maintaining a public-private divide. This would alleviate any concern of the constitution preempting individual liberty by requiring private actors to conform to public scrutiny. This would not be a concern because private actors do not have a duty to conform their conduct to the constitution. Rather, the constitution influences development of the law governing private acts.

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[61] Tushnet, supra, at 82.
[62] Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), § 35(3).
[63] Id. at § 7(1).
[64] Tushnet, supra, at 83 ("The Constitutional Court's decision was controversial. I believe that the fundamental reason was that private actors in South Africa, given power in the market by the common law's rules, could exercise that power to perpetuate the social conditions arising out of apartheid.").

3. A Model of Vertical Effect: The American State Action Doctrine

A model of vertical effect requires state action to trigger constitutional protection.[65] America's Constitution[66] has vertical effect because it does not punish private actions.[67] The American Constitution distributes power between a tripartite federal government that only protects individuals against government interference with civil rights and liberties.[68] Unless the government somehow coerces, authorizes, encourages, or is entwined with the private acts — allowing the court to convert the private acts into state action[69] — the Constitution does not reach private conduct.

If there is state action, the next question is whether this government conduct violates a protectable constitutional right. The 14th Amendment only guarantees procedural due process if there has been a deprivation of a "life, liberty, or property" interest. A person arguing that he is entitled to some kind of process based on the state's deprivation of his protected property interest

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[65] Gardbaum, supra, at 394.

[66] The text of the U.S. Constitution only confers negative rights as distinct from most foreign constitutions. See DeShaney v. Winnebago Cnty. Dep't of Soc. Services, 489 U.S. 189, 195 (1989) ("But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."); Mark S. Kende, The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective, 6 Chap. L. Rev. 137 (2003) ("Yet the International Covenant on Economic, Social, and Cultural Rights, as well as many foreign constitutions, require governments to affirmatively provide socio-economic necessities. The theory is that liberty at least presumes subsistence.").

[67] Murray Hunt, The "Horizontal Effect" of the Human Rights Act, 1998 Public Law 423, 427 ("The jurisdiction . . . closest to the position favoured by the verticalists is the United States.").

[68] Erwin Chemerinsky, Constitutional Law: Principles and Policies, 477, 507 (3d. 2006) ("The Constitution's protection of individual liberties and its requirement for equal protection apply only to the government. Private conduct generally does not have to comply with the Constitution.").

[69] See exceptions to state action doctrine discussed below.

must show a legitimate claim of entitlement to this interest based on an independent source that created, defined, and secured his reasonable expectation that he would keep getting the benefit. Upon a showing of state action and protectable property interest, then, a person must still show that the process available is undue.

The mental gymnastics required to convert private acts into state action are necessary to preserve to the cornerstone of the America Constitution: individual liberty. By freeing the actions of private entities and individuals from constitutional restraint, the State Action Doctrine preserves this overarching exaltation of liberty to which everything else is subordinate. Moreover, as a matter of comity, protecting private actors from other private actors is something the states should regulate as they see fit.

A. The Comparative Underpinnings: Textual Sources and Key Case Law

The Constitution only allows the American federal government to protect individuals' from state actions that violate the fundamental rights protected by the 14th Amendment. This is because, 130 years ago, the United States Supreme Court created the state action doctrine[70] by finding that the 14th Amendment —textually and consistent with the Framers' intent— applies only to the states as states.[71] The 14th Amendment begins, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[72] The Court read the word

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[70] Chemerinsky, Constitutional Law, at 508.

[71] Civil Rights Cases, 109 U.S. 3 (1883). See e.g. Shelly v. Kramer, 334 U.S. 1, 13 (1948) ("That [14th] Amendment erects no shield against merely private conduct, however discriminatory or wrongful.").

[72] U.S. Const. amend. XIV, § 1, "Due Process Clause." The Equal Protection Clause of the 14th Amendment goes on to declare that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

"State" as declaring that the constitutional provision applied only to government, and not private, deprivations.[73]

It compounded this textual reading by holding, as a matter of comity, that regulating purely private interactions is the business of the states.[74] The Court essentially neutered its own and Congress' 14th Amendment power to remedy racial segregation and discrimination, reserving this power for the states. And, so, for 89 years, the states made laws that perpetuated invidious discrimination in all aspects of private life.[75] People were forced to attend inferior schools, barred from certain professions (e.g. judges, lawyers, doctors, accountants, professional sports), and shut out from certain business opportunities because of race. It was one-step up from slavery: total, cradle-to-the-grave segregation. However inhumane, it was constitutional.

Congress' inability to make laws reaching private racial discrimination arguably is less egregious in modern America over which a black President Obama resides, where Congress has expanded power under the commerce clause to reach acts of discrimination, and the states have enacted their own laws prohibiting discrimination.[76] Still, Congress' inability to reach private actors persists in new ways. The Supreme Court recently struck down as unconstitutional a

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[73] Civil Rights Cases, 109 U.S. at 3.

[74] Id. The Court went on to read the 13th Amendment as conferring a similarly narrow enforcement power on Congress. Although the 13th Amendment was not textually limited to the States (like the 14th Amendment), it limited Congress' power to the strict subject matter of slavery and involuntary servitude.

[75] See, e.g. Jim Crow laws existed for almost 90 years.

[76] For example, the Court did not uphold the Civil Rights Act of 1964 based on Congress' 14th Amendment power. It upheld the Act as within Congress' power because it interfered with commerce because blacks were not willing to travel around knowing they could not eat in certain restaurants or sleep in certain hotels. Constitutionally, it was irrelevant that the Act prevented people from being treated as subhuman, it only mattered that it interfered with commerce.

federal law creating a private cause of action for victims of gender crimes because Congress can a law punishing the private acts of an abuser under the 14th Amendment.[77]

Whatever the modern formulation, it is undisputed that the 14th Amendment does not protect me from private actions that interfere with my fundamental rights unless I carry the heavy burden of convincing a court to convert such private acts into state action. There are four[78] ways around, or exceptions to, the state action requirement. Each allows a court to convert the acts of a private entity or individual into government acts that trigger the Constitution. Whether a particular exception will apply depends on the case-specific facts.[79]

The first exception will convert private action that constitutes both a traditional and an exclusive public function into a government action.[80] Although it would be rare for something to be both a traditional and an exclusive government function today, a modern example would be a privately owned town[81] or prison.

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[77] United States v. Morrison, 529 U.S. 598 (2000) (striking down as unconstitutional the civil remedy provision of the Violence Against Women Act of 1994 allowing victims of gender-motivated crimes to seek damages from any abuser).

[78] I use Professor Riccio's four exceptions, but note that other sources group the same propositions underlying these four exceptions in other ways. See, e.g., Chemerinsky, Constitutional Law, at 517 ("There are two exceptions to the state action doctrine. One is the 'public functions exception . . . the other is the 'entanglement exception', which says that private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.").

[79] Burton v. Wilmington Parking Auth., 365 U.S. 715,722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

[80] Marsh v. Alabama, 326 U.S. 501 (1946).

[81] E.g., This might apply to law challenged as unconstitutional that governs residents of Breezy Point, a privately owned co-operative community located in the New York City borough of Queens on the western end of the Rockaway peninsula. The Breezy Point Cooperative runs this community and the residents pay for maintenance, security, and other costs. The co-op owns the whole 500-acre neighborhood and the residents own their homes and shares in the co-op. The co-op employs a private security force, and restricts access to owners, residents, and guests. There are three volunteer fire departments. http://queens.about.com/od/neighborhoods/a/Breezy-Point.htm.

Another exception applies if the government has coercive power or control over the private actor.[82] A court converted the private corporation Amtrak into a state actor because the government had coercive power and control over Amtrak where: Amtrak was a product of federal law, created to further government objectives; Amtrak received substantial government funding; the President had permanent power to appoint a majority of Amtrak's directors.[83]

A third way to trigger the Constitution is by showing that the government significantly encourages the private activity.[84] For example, it was state action where two state courts facilitated private violations of the Equal Protection Clause by ordering injunctions to enforce private contracts between neighbors with racially restrictive covenants that prevented willing white people from selling their homes to black people.[85] The Supreme Court explained:

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[82] Lebron v. Nat'l RR Passenger Corp., 513 U.S. 374, 399 (1995) ("[A] corporation is an agency of the Government, for purposes of the constitutional obligations of Government . . . when the State has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees.").

[83] Id. at 400 ("[W]here, 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.").

[84] Shelly, 334 U.S. at 19 ("It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.").

[85] Id. ("[T]he States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.").

> Judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.[86]

This holding is "extremely controversial in U.S. constitutional law."[87] The controversy centers on the consequence of converting the private action in state action: it indirectly imposes constitutional obligations not to discriminate on private parties.[88]

The most popular way to convert private action is by showing that an agency or symbiotic relationship exists between the government and the private actors.[89] This nexus exists where the public and private actions are entwined, intermingled, joint, or interdependent. For example, the Court found this required "nexus factor" between the private Eagle Coffee Shop lessee and its government agency lessor, Delaware State Wilmington Parking Authority.[90] There, Eagle claimed it had to refuse service to black people to keep its profits from white customers.[91]

The required interdependence existed, allowing the Court to covert this private discrimination into state action triggering the 14th Amendment.[92] There were multiple levels of

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[86] Shelly, 334 U.S. at 20.

[87] Tushnet, supra, at 81. See also, Erwin Chemerinsky, Rethinking State Action, 80 Nw. U. L. Rev. 503, 525 (1985) ("[T]his holding in Shelley was controversial.").

[88] Tushnet, supra, at 81 ("Shelley seems to impose nondiscrimination obligations on private parties, giving standard horizontal effect to the equal protection clause . . . But standard U.S. constitutional doctrine is that constitutional provisions do not have horizontal effect.")

[89] Burton, 365 U.S. at 722 ("[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.").

[90] Id. at 715,719-20.

[91] Id. at 724.

[92] Id. at 725 ("The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account,

interdependence or entanglement shown between the private conduct of the Eagle Coffee Shop and the public conduct of the Delaware State Wilmington Parking Authority. The public owned the land and the building housing the coffee shop leased by Eagle the adjacent State-run parking facility.[93] The building was "dedicated to public uses" that serve "essential government functions" including the parking garage.[94] Public funds entirely paid for the costs associated with "land acquisition, construction, and maintenance."[95] Public funds also paid for the costs related to building upkeep, maintenance, repairs.[96] The property was integral to the State's goal of self-sustaining operation of its parking service.[97]

Various lease provisions also gave Eagle several tax abatements and exemptions.[98] Moreover, there was no physical distinction between the premises owned and operated by the state and those of its private lessee. The government compounded this fact by affixing multiple signs to the indivisible structures declaring it was State property or otherwise bearing the

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cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.").

[93] Burton, 365 U.S. at 723.

[94] Id. at 723.

[95] Id. ("The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable.").

[96] Id. at 724 ("Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds.")

[97] Id. at 723-24 ("[T]he commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit.").

[98] Id. at 718, ("The Authority has no power to pledge the credit of the State of Delaware but may issue its own revenue bonds which are tax exempt. Any and all property owned or used by the Authority is likewise exempt from state taxation."); Id. at 719 ("Eagle spent some $220,000 to make the space suitable for its operation and, to the extent such improvements were so attached to realty as to become part thereof, Eagle to the same extent enjoys the Authority's tax exemption."), 724 ("Should any improvements effected in the leasehold by Eagle become part of the realty, there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency.").

trappings of government signage.[99] For example, like the American and the Delaware State flags that waved on the roof.[100]

The Court gave weight to the mutually beneficial relationship between the Eagle Coffee Shop and the Delaware Parking Authority.[101] Eagle customers had a convenient place to park, which likely increased its business and provided additional demand for the State's parking services.[102] The profits Eagle claimed it earned from discriminating did not just contribute to the State's parking operation, but were indispensable to the government agency's fiscal success.[103] Together, these factors "indicat[ed] that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."[104]

In this way, the court employs a fact-intensive analysis to determine whether to convert a private corporation's conduct into state action that must comply with the 14th Amendment. But, conversion is only the first step. Then the question becomes whether this converted action violates the rights and liberties protected by the 14th Amendment. For example, a non-tenured public school teacher failed to show he had a protected property interest in continued

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[99] Burton, 365 U.S. at 720 ("Upon completion of the building, the Authority located at appropriate places thereon official signs indicating the public character of the building . . . .").
[100] Id. at 720 ("[F]rom mastheads on the roof both the state and national flags [flew].").
[101] Id. at 724 ("It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits.").
[102] Id. ("Guests of the restaurant are afforded a convenient place to park their automobiles, even if they cannot enter the restaurant directly from the parking area. Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities.")
[103] Id. ("Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.").
[104] Id.

employment entitling him to a hearing about the school's decision not to rehire him.[105] There was no protectable property interest because:[106]

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[107]

There, no protectable property interest existed because no independent source suggested the teacher had a reasonable expectation of employment beyond his 1-year contract term.[108] The contract had a specific termination date and "made no provision for renewal whatsoever."[109] His "appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it."[110] Absent some independent source to create, define and secure the benefit of job tenure, it was not reasonable for the teacher to expect he had a legitimate claim to this benefit.[111] Procedural due process does not protect such abstract concerns.[112]

Another non-tenured public school teacher raised "a genuine issue as to his interest in continued employment, [which] though not secured by a formal contractual tenure provision,

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[105] Board of Regents v. Roth, 408 U.S. 564, (1972).
[106] Id. at 571 ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.").
[107] Id. at 577.
[108] Id.
[109] Id. at 578.
[110] Id.
[111] Id. at 577.
[112] Id. at 578 ("In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.").

was secured by a no less binding understanding fostered by the college administration."[113] This teacher claimed reliance on the school's faculty guide as an independent source that created, defined and secured his legitimate claim of entitlement to continued employment.[114] The following faculty guide provision allegedly gave the teacher a reasonable expectation of contract renewal under a de facto tenure system:

> Teacher Tenure. Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.[115]

The fact that state agents developed and disseminated these guides increased the legitimacy of the teacher's claimed reliance.[116]

In addition to these written guides, another possible independent source was the "unwritten common law" of the school.[117] The Court explained that the factual circumstances surrounding the teacher's service could be an independent source creating, defining, and securing his legitimate claim of entitlement to job tenure despite the express terms of his employment.[118]

> Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective-bargaining agreement, so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.[119]

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[113] Perry v. Sindermann, 408 U.S. 593, 600 (1972).
[114] Id.
[115] Id. The teacher also claimed legitimate reliance upon guidelines issued by the Coordinating Board of the Texas College and University System suggesting he had "some form of tenure." Id.
[116] Id. at 602-03.
[117] Id.
[118] Id. at 602.
[119] Id. (quoting United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579 (1960)).

This teaches that the unwritten "common law of the shop"[120] can supplement collective bargaining agreements and be independent sources of protectable property interests.[121]

Proving the existence of state action and a protectable property interest, of course, would not entitle this teacher to reinstatement.[122] Rather, such proof would entitle him to *some kind* of opportunity to prove the legitimacy of his claim to continued employment "in light of the policies and practices of the institution."[123] It would require the school to grant the teacher's request for a hearing, where it would inform him of the grounds for his nonrenewal and where the teacher would the chance to challenge those grounds as insufficient.[124] Whether such a hearing would satisfy procedural due process depends on if it would give the teacher a reasonable opportunity —time, place, and manner— to be heard.[125]

Courts balance the following four factors to determine if the time, place, and manner of a given hearing or process is undue: (i) the value of the private interest affected; (ii) the risk of the available process erroneously depriving the person of that private interest; (iii) the probable value, if any, of adding or substituting into the current process procedural safeguards that are not now in place to mitigate such erroneous deprivation; and (iv) the Government's interest,

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[120] United Steelworkers, 363 U.S. at 579-80 ("Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.").
[121] Perry, 408 U.S. at 602.
[122] Id. at 603.
[123] Id.
[124] Id. ("Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.").
[125] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

considering its function and the monetary and administrative burdens these supplemental safeguards would impose upon it.[126]

In any given case, the manner of the opportunity to be heard that is in use can determine whether the state deprives someone of a protected life, liberty or property interest. This makes sense, given the broad spectrum of reasonable ways to be heard that satisfy procedural due process, ranging from: *The Super-Deluxe, Big Mac* ("Everything's on it!" A process with all the accoutrements of a legal trial, e.g. the right to counsel, a reasoned decision, a jury, a fair and impartial decision maker, pre-hearing discovery, application of the Rules of Evidence); to *The Bare Bones* ("Something in between *Big Mac* and *Most Basic*." This process has some of the accoutrements of a legal trial);[127] to *The Most Basic* ("It's something!" This process has slim-to-none of the bells and whistles available in a legal trial.).[128]

Access to an unbiased decision maker is a key element to satisfying the reasonable manner aspect of the reasonable opportunity to be heard requirement of procedural due process. Being denied a neutral decision maker in an official proceeding in a state's highest court violates the fundamental right to procedural due process protection.[129] Whether a judge is a biased decision maker is an objective inquiry that asks "not whether the judge is actually, subjectively

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[126] Mathews, 424 U.S. at 335 ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

[127] For example, Guantanamo detainees have a right to a hearing, but the decision makers are military officers of the U.S. They do not have the right to a lawyer, but they have a right to a military representative. The Rules of Evidence do not apply completely.

[128] For example, a kid gets caught smoking pot in the bathroom of a public high school and is sent to principal's office. The principal says, "You were caught smoking pot, you are suspended for 10 days. Do you have anything to say for yourself?" The kid says nothing. Did the kid have a hearing? He got something! Was it sufficient to satisfy PDP? Yes, assuming the property right exists that is usually involved when dealing with public school suspensions, expulsions, etc.

[129] Caperton v. T. Massey Coal Co., Inc., 556 U.S. 868 (2009).

biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[130]

Ultimately, this means that state action is only the first hurdle to obtaining procedural due process protection under the 14th Amendment. There must also be a protectable life, liberty or property interest. If so, then the claimant is entitled to some kind of process that gives him reasonable notice and a reasonable opportunity to be heard. Whether the time, place, and manner of a given opportunity to be heard is reasonable depends on the balance of the private and the government interests in using the process in place or in adding valuable safeguards to that process that would mitigate the risk of erroneously depriving a person of their protected interest.

B. Justifications for State Action: Free Individuals and Separate Powers[131]

The leading justification for requiring state action is that it preserves America's core ideal: individual liberty.[132] Limiting the Constitution's reach to the public sphere allows the private sphere to operate without regard for constitutional norms.[133] America is *the land of the free* and that includes the freedom to be an egalitarian and the freedom to be a bigot. It means a private actor is free —constitutionally speaking— to deprive an individual of his fundamental rights without consequence. State action thus stops the constitution from preempting individual liberty by requiring private actors to conform their conduct to constitutional values and demands.

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[130] Caperton, 556 U.S. at 881.

[131] Butler, supra, at 20, n.45 (noting that invoking constitutional rights to impugn acts of the government, but not those of private persons conforms to "the normal, expected role of a constitution") (quoting P. Hogg, Constitutional Law of Canada, 2nd ed., (Toronto: Carswell, 1985) at p. 677).

[132] Gardbaum, supra, at 394.

[133] Tushnet, supra, at 89 ("At the core ideal of liberal autonomy is the proposition that private actors operate in a domain where their reasons for acting are free from public scrutiny.").

Federalism underlies the American state action doctrine. Requiring state action to trigger constitutional protection cements the public-private division and respects State sovereignty.[134] It is the business of the state, not the federal, government to regulate the private sphere. The argument is that without a state action requirement, the Constitution would reach virtually all private activity. This would tee-up Congress and the federal judiciary to displace the power of the sovereign states to regulate private matters. State action thus preserves some state power under the federal scheme.

[134] Gardbaum, supra, at 394.

II. APPLYING THE COMPARATIVE MODELS TO AMERICA'S FAVORITE PASTIME: WHAT IF THE MLB WAS A STATE ACTOR VIS-À-VIS A-ROD'S APPEAL OF HIS SUSPENSION FOR PEDs USE IN ARBITRATION?

1. The Background Story: The Road to the Arbitration of A-Rod v. MLB

The public sting from 1994 baseball strike finally seemed to in 1998 when fans could not help but wax nostalgic as Mark McGwire of the St. Louis Cardinals and Sammy Sosa of the Baltimore Orioles competed to be the first to break Roger Maris' single season home run record.[135] Refreshed fan interest and loyalty peaked in 2001 when Barry Bonds hit 73 home runs to retire Sosa and McGwire's single season records. Although fans believed this just might be baseball's "Golden Age," it turns out this was something more akin to America's pastime entering the "Gilded Age of PEDs."

At least Congress seemed to agree in 2005 when it launched an investigation into PEDs use by MLB players, shortly after Jose Canseco[136] published a memoir ("*Juiced*") detailing his own and other players' (including McGwire and Sosa's) uses of PEDs. Congress subpoenaed Canseco, McGwire, Sosa and other current and former MLB all-stars to appear and testify before the House Government Reform Committee to discuss PEDs use in MLB.[137] The world watched the televised hearing, as Canseco told the Committee that PEDs in MLB were "as acceptable in the '80s and mid-to-late '90s as a cup of coffee."[138] Canseco urged Congress not "to let the league police itself, no ifs or buts about it," or else "We'll be back here quicker than quick."[139]

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[135] Complaint, A-Rod v. MLB, No, 13-CIV-7097 (N.Y. Sup. Ct., Oct. 3, 2013) ("Complaint"). Hereinafter, unless indicated otherwise, this is the general source of all factual information cited.
[136] Conseco is a retired MLB player, once known as a power hitter for the Oakland Athletics.
[137] Ted Barrett, McGwire mum on steroids in hearing, CNN.com (March 17, 2005), http://www.cnn.com/2005/ALLPOLITICS/03/17/steroids.baseball/.
[138] Id.
[139] Id.

"Earlier, committee members said officials of the national pastime have failed to confront the problem of performance-enhancing illegal drugs."[140] McGwire also admitted to "a problem with steroid use in baseball" and said that he would "help lawmakers combat the use of performance-enhancing drugs by younger players."[141] Lawmakers also said, "they are concerned about steroid use because of the perception it creates among college and high school athletes, pointing to studies showing increased steroid use in youths."[142]

By 2006, the public pressure on MLB to handle its PEDs mess led Commissioner Allan H. "Bud" Selig to appoint former Senator George J. Mitchell to investigate the use of PEDs by MLB players. The December 2007 "Mitchell Report" publicized the extensive use of PEDs in MLB and recommended specific ways to attack the apparent epidemic. In 2008, the players' union (the "Major League Baseball Players Association" or the "MLBPA") and MLB responded by amending the existing labor agreements to include a more rigorous system of testing and punishment for PEDs use.[143] For example, the penalty for a first-time violation increased from a ten- to a fifty-game suspension and from a thirty- to a 100-game suspension for a second offense.

While those penalties still exist under the current[144] collective bargaining agreement ("CBA" or "Basic Agreement") and Joint Drug Prevention and Treatment Program (a.k.a. "Joint Drug Agreement," "JDA" or "Program"),[145] they are not exclusive.[146] In fact, the JDA states that

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[140] Barrett, supra.
[141] Id.
[142] Id.
[143] Major League Baseball and Players Association modify Joint Drug Agreement, MLB.com, (April 11, 2008), http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080411&content_id=2515749&vkey=pr_mlb&fext=.jsp.
[144] Basic Agreement, MLBPA.com, http://mlbplayers.mlb.com/pa/info/cba.jsp ("Basic Agreement"), § 7(A).
[145] The current JDA went into effect in December 2011 and will terminate Dec. 1, 2016 (the same date as the Basic Agreement). In January 2013, MLB and MLBPA announced several key

a "Player may be subjected to disciplinary action for just cause by the Commissioner for any Player violation of Section 2 above not referenced in Section 7.A through 7.F above."[147] This gives the Commissioner carte blanche — *if there is just cause*— to subject a player to any penalty *not* expressed directly in the JDA.[148] The JDA itself does not define "just cause" or indicate which party bears the burden of proving it exists. Instead, it punts on all such matters by adopting the grievance procedure and rules created and defined by the CBA ("Grievance Procedure" or "Rules").[149]

On August 5, 2013, MLB and Commissioner Allan H. "Bud" Selig invoked the just cause provision of the JDA to discipline A-Rod for using PEDs and suspended him for 211 games.[150] This is exactly the kind of penalty "not referenced" otherwise in the JDA that, by definition, is within Selig's exclusive[151] "for just cause" enforcement power.

On August 8, 2013, A-Rod availed himself of the only remedy the Rules allow by appealing to the Arbitration Panel.[152]

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amendments to the JDA, including the adoption of in-season blood testing for Human Growth Hormone and enhanced testing techniques aimed at improving detection of illegal testosterone usage. MLBPA Info, MLBPA.com, (Nov. 1, 2013), http://mlbplayers.mlb.com/pa/info/cba.jsp.

[146] MLB's Joint Drug Prevention and Treatment Program , MLBPA.com, http://mlbplayers.mlb.com/pa/info/cba.jsp ("JDA"), at 1.

[147] Id.

[148] Id.

[149] Id. ("Except as otherwise provided herein, any dispute arising under the Program shall be subject to resolution through the Grievance Procedure of the Basic Agreement," which also includes Appendix A, Rules of Procedure.").

[150] Complaint, at 25.

[151] Id. at 28 (All authority to discipline Players for violations of the Program shall repose with the Commissioner's Office.").

[152] Basic Agreement, art. XI ("Grievance Procedure"), § A ("Definitions"), (9).

> "Arbitration Panel" . . . means the impartial arbitrator or, where either Party elects . . . a tripartite panel so empowered and composed of the impartial arbitrator and two party arbitrators, one appointed by [MLBPA,][153] the other appointed by [MLB].[154] The impartial arbitrator, who shall in all instances be designated as the Panel Chair, shall be appointed by agreement of [MLBPA] and [MLB].

The Arbitration Panel reviews player appeals of JDA violation determinations, including "whether the level of discipline imposed was supported by just cause."[155] The Arbitration Panel must determine "whether there has been just cause for the penalty imposed" on A-Rod by MLB and Selig under the JDA.[156]

The Grievance Procedure governs A-Rod's appeal, but the Panel Chair has the power to use any "procedures he or she deems appropriate."[157] For example, the Panel Chair is the evidentiary gatekeeper:

> The Parties may offer such evidence as they desire and shall produce such additional evidence as the Panel Chair may deem necessary to an understanding of the dispute. The Panel Judge shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.[158]

The Panel Chair has the power to compel a party to produce a witness that he deems necessary to appear, give testimony and be made available for cross-examination by the other party.[159]

The acting Panel Chair ("Fredric Horowitz") thus holds the fate of A-Rod in his hands. The MLB and MLBPA appointed Horowitz as "baseball's lone arbitrator for grievances" after removing his predecessor, Shyam Das, following his decision to overturn the 50-game

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[153] Replacing "the Association," meaning MLBPA. Basic Agreement, art. XI § A, at (6), (9).
[154] Replacing "the LRD," meaning MLB's Labor Relations Department. Basic Agreement, art. XI § A, at (7), (9).
[155] JDA, at 28.
[156] Basic Agreement, art. XII ("Discipline"), § A ("Just Cause").
[157] JDA, at 32.
[158] Basic Agreement, Appendix A. Rules of Procedure: Grievance Arbitration Hearings Before The Arbitration Panel ("Rules"), (8).
[159] Id. at (8), (9).

suspension imposed on the Brewers' Ryan Braun by the MLB for PEDs use violating the JDA.[160] Horowitz's salary is jointly paid by MLB and the Players Association.[161]

Although the JDA is explicit that an appeal such as A-Rod's must be kept strictly confidential with few exceptions.[162] Accordingly, the public only knows what MLB and A-Rod want us to know. Nonetheless, credible media sources continue to report serious allegations of MLB misconduct in the collection of evidence related to A-Rod's suspension. The alleged misconduct began in January 2013, after a Miami tabloid published documents it received from the disgruntled former employee ("Porter Fischer") of an anti-aging clinic in Florida ("Biogenesis") identifying A-Rod and other MLB players who used Biogenesis to get PEDs. MLB wanted the source documents for the tabloid's story, but could not legally obtain them.

So, on March 22, 2013, MLB sued Biogenesis in a rather obvious sham suit designed to "skir[t] the procedural safeguards concerning MLB investigations found in the JDA and CBA."[163] An attorney affiliated NBC sports wrote an article entitled, *MLB's lawsuit against Biogenesis should be laughed out of court*, decrying the "transparent and cynical attempt by MLB to obtain documents."[164] Apparently, discovery in a sham suit was not enough. Two days after MLB sued Biogenesis, Porter Fischer filed a complaint with the Florida police reporting that the Biogenesis source documents were stolen from his car. The police report detailed several meetings predating the theft where Dan Mullin and other MLB investigators offered Fischer "a job and up to $125,000 for the client files."[165]

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[160] http://www.newsday.com/sports/baseball/yankees/arbitrator-fredric-horowitz-to-decide-alex-rodriguez-s-fate-1.5836640.
[161] Id.
[162] JDA, at 19-22 (detailing strict confidentiality concerning disclosure of player information).
[163] Complaint, at 12.
[164] Id.
[165] Id. at 16.

One MLB investigator, Kevin O'Rourke, even called the Florida police department to inquire about the incident. The *Times* also reported that MLB was paying a former Biogenesis employee for documentary evidence in the case. Two months later, the Miami tabloid interviewed Fischer who said MLB investigators had, on distinct occasions, offered him $1,000 per week salary as a consultant to cooperate and $125,000 for all the Biogenesis documents he had that could authenticate in an affidavit.

Apparently, MLB investigator Mullin "purchased what were represented to be these stolen documents for $150,000 cash, which was handed off in a bag at a Fort Lauderdale, Florida area restaurant."[166] After publically denying accusations of the same, Mullin also has admitted to sleeping with a material witness (a former nurse at Biogenesis) who Mullin himself interviewed in connection with the MLB investigation.[167]

Multiple media outlets also reported that MLB negotiated with Anthony Bosch, the alleged mastermind who controlled Biogenesis, to drop its suit against him in exchange for his full cooperation in providing evidence and testimony against MLB players. MLB also apparently promised to provide Bosch with personal security, pay his legal bills, and indemnify him for civil liability that may arise from his cooperation. There are reports that MLB is paying Mr. Bosch a total of $5 million (in monthly installments) to secure his cooperation.

As such, Horowitz must decide whether evidence allegedly obtained in such dubious ways is relevant and, if so, the weight to accord it. In November 2013, Horowitz decided not to employ his authority as Panel Chair to compel Selig's testimony in A-Rod's appeal. This decision was against A-Rod's objection that the Commissioner's testimony is —of course—

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[166] Complaint, at 16.

[167] http://www.nydailynews.com/sports/i-team/mlb-investigator-sexual-relationship-witness-a-rod-article-1.1524134.

necessary to decide whether "just cause" existed for Selig to suspend A-Rod for 211 games based on a JDA provision requiring Selig to impose such a penalty only "for just cause."

Horowitz should issue a final decision by January 2014.[168] If Horowitz affirms the suspension, A-Rod would not be eligible to return until 2015, when he is 40 years-old.[169] In practice, the suspension likely would void the remainder of his 10-year, $275 million contract with the Yankees that runs through 2017 and requires the team to pay him almost $95 million.[170] As such, a 211 game suspension will be the effective end of A-Rod's MLB career.[171]

2. American State Action

The only thing A-Rod can do now is wait. If Horowitz affirms the suspension, A-Rod has one card left to play: amending his state court lawsuit to include a procedural due process claim. The claim is that allowing MLB to suspend A-Rod based on the arbitration arguably deprives him of a protected property interest in continued employment without procedural due process. To succeed, A-Rod would have to convince an American court to convert MLB into a state actor. Assuming it did, A-Rod would then have to show he had a protectable property interest in continued employment based on his labor contracts and the "common law of the MLB shop." If a court agreed, A-Rod would have to show that the arbitration process available under the Grievance Procedure was undue under the four-factor balancing test.

The biggest hurdle, or course, is showing the required nexus between MLB and government to convert the private acts into state action. the only thing close to MLB is Eagle Coffee Shop. And, in reality, Burton is not a case that keeps private corporations up at night

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[168] http://espn.go.com/mlb/story/_/id/9540755/mlb-bans-13-including-alex-rodriguez-new-york-yankees-2014.
[169] Id.
[170] Id.
[171] Id.

fearing conversion into state actors. This is because it is pretty much the only time the Court found those facts sufficient to establish the required nexus.

Although the Yankees own the new stadium, New York owned the previous stadium. Even so, the public absorbs millions of dollars every year because the stadium and its state-run parking facilities are not making enough money. The billions of dollars New York gave the Yankees in tax abatements mirrors the mutually beneficial relationship of Eagle and Delaware. It seems to defy logic to classify Yankee Stadium as anything but a building dedicated to public uses. Likewise, there is no physical distinction between the state-run parking facilities, Yankee stadium, and America's pastime. In other words, a reasonable person entering Yankee stadium —as the stars and stripes wave from the roof and the Star Spangled Banner blares from the speakers— would think the facility was run by New York. (But, isn't it?)

Moreover, since 2006, Congress' publicly has entwined itself with PEDs use by MLB players. The existing JDA and CBA resulted from the Mitchell Report. And, the Mitchell Report would never have been written let alone publicized with the Congressional hearings in 2006. The entire discipline process currently in place, arguably began with the joint actions of Congress and MLB in investigating allegations of pervasive PEDs abuse in the major leagues.

Assuming MLB get converted into a state actor, A-Rod can make a plausible claim that he has a protected property interest in continued employment with the Yankees absent just cause. Like Sindermann, A-Rod can argue he relied on independent sources that created and secured a legitimate claim of entitlement to job tenure absent just cause. A-Rod can point to the JDA and CBA provisions that created, defined and secured a reasonable expectation that MLB would not suspend him for 211 games without just cause. This should not be difficult to prove given the language of these agreements, supplemented by the unwritten common law of MLB.

The final hurdle will be showing that, under the Matthews balancing test, the arbitration process available under the Grievance Procedure is undue. The private interest affected, of course, would be given much greater weight under a positive constitution. For example, the Irish constitution protects a fundamental right to earn a living. A legitimate claim of entitlement to a property interest in continued employment absent just cause would thus have more value under the Irish constitution. Nonetheless, under Perry, A-Rod has a solid protectable interest that would be given at least some value.

The risk of erroneous deprivation is high, but there are valuable procedural safeguards available that a court could require MLB to add to the Grievance Procedure to mitigate this risk. For example, requiring the Rules of Evidence to apply to the arbitration would eliminate almost all of the risk that MLB suspended him for anything but just cause. The typical government interests burdened in adding these safeguards —"too much money, not enough time"— do not apply with equal force to MLB.

2. Models of [In]direct Horizontal Effect

A-Rod's fate does not look much different under a constitutional model of indirect horizontal effect. The Charter and the Basic law, for example, would not directly bind MLB. There would be no independent constitutional cause of action to redress the private employer's interference with private employee's right to continued employment. In fact, A-Rod fares better under a state action model that at least gives the option of arguing for conversion. While proponents of this model boast it is the best of both worlds, A-Rod would beg to differ if he was stuck with the Charter instead of the American constitution. Although the Canadian "governmental action" test similarly ensures the state is acting, there is no similar case law to Burton allowing for conversion where there is joint activity, interdependence, and entanglement.

A constitution with direct horizontal effect, however, would really change up the playing field for A-Rod's constitutional claims. Although the Irish Court has not adopted a categorical position of direct horizontal effect, it seems clear that the Bunreacht applies to private litigation The Bunreacht would remove the biggest obstacle obstructing A-Rod's path to procedural due process: converting MLB into a state actor. Indeed, the Irish Court would only need to decide if the arbitration process satisfied procedural due process demands. Given the precedent in this area, A-Rod would not have trouble convincing the Court that there was a dispute resolution process in place and it was undue.

More importantly, if the procedural due process claim failed, the game would not end. The Irish Constitution thrives where no other model can exist: in that gray area between the public-private divide to prevent interference with any fundamental interests otherwise left unprotected. This is because, as a model of direct horizontal effect, the Bunreacht allows a person to invoke it directly where the ordinary private law leaves it without redress. This "constitutional tort" remedies that sticky situation where a fundamental infringement is palpable, but the infringing conduct somehow slips through the existing private law without consequence. Fear not, A-Rod, the Bunreacht will protect you.

III. CONCLUSION

So, maybe, A-Rod's case gives us the rare opportunity to consider anew the meaning of living in *the land of free* when our private law fails to pick-up where our Constitution stops. The 90 years following the Civil Rights Cases, begged us to remember that it means: *the freedom to do good and the freedom to do bad; the freedom to be an egalitarian and the freedom to be a racist.* But, modern America is forgetful. It forgets that electing a black President, giving Congress expanded commerce clause power, and enacting private anti-discrimination laws did not solve the "state action problem."

Morrison reminded us that Congress' inability to reach private actors under the 14th Amendment creeps up in new ways. Perhaps, A-Rod's hypothetical procedural due process claim against MLB offers another modern formulation. Admittedly, the inability to protect otherwise silenced rape victims is far a feel from the inability to protect A-Rod from deprivation of a longer MLB career without a *Super Deluxe, Big Mac* hearing. But, the constitutional point remains worthy of consideration. Not because we feel bad for A-Rod or disagree with MLB and Selig that America's pastime would be better off without him. But, because, sometimes, our state action plan fails. It fails when there is a fundamental interest that everyone agrees is worth protecting, but the constitution punts to the state and the state drops the ball.

While this failure is rare, it raises the question of what harm really comes from allowing a constitutional tort to fill these sporadic gaps. The Irish model suggests no such harm exists. The Bunreacht arguably allows the Irish Court to protect liberty and federalism concerns without erecting a public-private barrier. A more realistic solution is to fill the holes quickly with the private law that was slow to cover in the first place. After all, this is America, and we would rather play whack-a-mole with these rare holes in our law than give up our freedom to be a bigot!