Discovering Private Law: Comment on Bruce Ackerman, We The People: The Civil Rights Revolution

Avihay Dorfman
DISCOVERING PRIVATE LAW:
TWO COMMENTS ON BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION

Avihay Dorfman*

February 22, 2015

INTRODUCTION

In his recent book, Professor Ackerman further develops his ambitious account of the constitutional identity of the U.S. polity. He does that by marshaling four mutually reinforcing methodologies: analyzing the history of the relevant legal and political scene before, during, and after the enactment of key civil rights laws; second, developing a legal reconstruction of this piece of history by locating these laws in their appropriate place within the American constitutional framework; third, developing a political-scientific account of the institutional mechanisms by which the American people have expressed their support for the civil rights legislations; and fourth, developing a philosophical reconstruction of the emerging constitutional framework in the light of the theory of dualist democracy he developed in his two previous volumes of We The People.

One of the most striking points of the Book comes out of the combination of the two following claims:

“Private actors, not only state authorities, must recognize constitutional rights; these rights include equal opportunity as well as respectful treatment within each sphere of constitutional concern.”

The rights in question are held by private individuals. And the revolution reported in this quote is that of extending the constitutional commitment to substantive (or, as Ackerman prefers, “real”) equality to capture crucial areas of horizontal interactions among private individuals. Assuming that Ackerman’s historical analysis is sufficiently precise and, indeed, compelling, I shall take stock of the nature and the content of the revolution at issue.

In reviewing these two claims (and the derivative claims to which each gives rise) I shall (A) resist Ackerman’s attempt to cast the civil rights revolution in terms of a constitutional-law revolution and (B) pose some questions concerning the conception of equality that underlies his account.

* Tel Aviv University Faculty of Law.

A. REVOLUTIONIZING WHAT? ON THE SITE OF THE CIVIL RIGHTS REVOLUTION

In principle, I fully agree that the positive source of a legal norm (be that a statute or a judge-made law) need not settle its normative status vis-à-vis other legal norms so that, under the appropriate circumstances, even a mere statute may possess the status of a constitutional provision. However, in the case of the civil rights revolution Ackerman seems to draw the wrong inference by viewing the various civil rights statutes as informal constitutional amendments. The revolutionary Title II (public accommodation) Title VII (workplace) and Title VIII (housing) do not so much reorder the vertical relationships between the state and its constituents. Rather, it changes the terms of the interactions between private persons (natural and artificial in the case of organizations).² There is a name for the law that governs the latter—private law, not constitutional law.³ The fact that a revolution in the existing law raises important constitutional questions does not necessarily make it a constitutional one.

To see that, suppose the U.S. had a European-style civil law code so that instead of enacting the Civil Rights Act, Congress would need to amend the code to reflect its nation-wide commitment for substantive equality in various areas governed by property and contract law pertaining to public accommodation, workplace, and housing. To be sure, the amendment would have to withstand constitutional review, say, on account of its alleged interference with the sovereignty of private owners (since they are deprived of their right to practice racial discrimination) as well as that of the States (since they lose some of their powers to determine the character of the private law in their respective jurisdictions).⁴ But it is important not to obscure the different questions at stake. In particular, it is one thing to consider the constitutionality of the hypothetical amendment; quite another to argue that it just is a constitutional amendment.

Against this backdrop, it seems that whereas Ackerman (convincingly) accuses contemporary constitutional law scholars and jurists for being court-centered—viz., by supposing that the Supreme Court decisions exhaust the constitutional canon of the last half-century or so—his account focuses almost exclusively on constitutional law. But why would it be appropriate to suppose that constitutional law is where all the

² The Voting Rights Act is different. On the one hand, it also governs horizontal interactions. But on the other hand, these are horizontal interactions among citizens, rather than merely private individuals. For this reason, it makes more sense to cast this landmark statute in terms of constitutional law. The case of Brown v. Board of Education falls somewhere in between precisely because school education is fundamental for students’ future status as free and equal citizens as well as private individuals interacting on equal footing with others in the domain governed by private law. See id. at 131.

³ Recently, the U.S. Supreme Court has observed that Congress created a “federal tort” and, thus, “adopt[ed] the background of general tort law” by enacting the Civil Rights Act’s Title VII. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1187 (2011).

⁴ For my argument to work, I must assume (as I do) that the hypothetical amendment can pass the bar of constitutional review.
action is. Certainly, the pursuit of justice in the relationships among private persons—more concretely, in Ackerman’s case, racial justice—is just as crucial in the case of private law.

Perhaps, however, Professor Ackerman understands “constitutio
nal law” and “private law” in radically different ways than the preceding discussion suggests. I can expect (or speculate) two such responses followed by my rejoinders. I discuss these responses because they reflect a deeper difficulty with the “private law canon” that is implicit in many debates among private law theorists and, more importantly for the present purpose, constitutional law theorists. The first response might arise from the thought that private law is essentially a creature of the common law tradition and, so, statutory interventions are either external or peripheral to this tradition. This is a popular mistake. It goes something like this: “The distance [between the Civil Rights Act and tort law] likely reflects their placement on opposite sides of the public-private divide, with Title VII and other anti-discrimination Statutes forming part of public law, while torts is a classic, private law subject.” That said, the hypothetical code mentioned above and the actual codes that exist throughout the world should make it clear why judge-made law is not a definitional (or otherwise essential) feature of the private law—it is even perfectly plausible to imagine the existing common law of property, contract, and torts as products of statutory law-making or other legal sources (such as constitutional provisions or transnational legal norms).

Second, and more importantly, casting the civil rights revolution in terms of a constitutional law revolution reflects the traditional liberal-egalitarian approach to justice. On this approach, liberal theories of justice make an explicit or implicit appeal to some version of division of labor between the responsibility of the state to ensure a fair starting-point for all and the responsibility of each individual to set and pursue her ends using her fair share of resources. What underwrites this division of labor is the distinction between substantive and formal equality. On this picture, the burden of meeting the demands of substantive equality rests fully on the state’s shoulders and, in particular, its public law institutions. By implication, the private law of the liberal-egalitarian state should, or even must, limit the demands it places on private individuals to no more, but no less, than equal formal freedom.

Against this backdrop, it is arguably plausible to expect that Ackerman’s philosophical reconstruction of the civil rights revolution will follow this larger

---


6 This is Ronald Dworkin’s view. Ronald Dworkin, Law’s Empire 296, 299 (1986).

7 This is Ernest Weinrib’s and Arthur Ripstein’s views. See Ernest J. Weinrib, Corrective Justice ch. 8 (2012); Arthur Ripstein, Force and Freedom: Kant’s Legal and Political Philosophy (2009).

philosophical tradition. The argument from division of labor could then be invoked to explain why the “private law” elements of the civil rights revolution—prohibiting discrimination in public accommodations, housing, and employment markets—are best understood in terms of public law and, indeed, constitutional law, achievements. That is, both public accommodation, workplace, and housing anti-discrimination laws enlist property owners in the service of meeting the demands of social justice. In particular, the state commandeers the support of private persons—owners, landlords, and employers, respectively—to realize collective goals. To this extent, private law is just an effective regulatory medium through which public law could operate to accomplish non-private law purposes. And since the instrumental publicization of private law has earned the support of We The People, Ackerman could argue that my accusation—that the civil rights revolution is, to an important extent, a private law revolution—fails to distinguish between means (private law) and ends (constitutional law).

There exists some evidence in the Book that pulls in this direction. For instance, one way to reconstruct Ackerman’s distinction between personal and institutionalized humiliation may emphasize the non-private, systematic dimension of discrimination. Another piece of potential evidence is Ackerman’s openly instrumentalist characterization of the Civil Rights Act as “display[ing] a distinctively pragmatic form of constitutionalism, deploying different operational principles to achieve the same objective: genuinely equal opportunity within each sphere.”

That said, a more sympathetic reading of Ackerman’s account will deny his association with the liberal-egalitarian argument from division of labor. The landmark statutes do not merely engage in the business of commandeering the support of private property owners to improve on the vertical relationship between victim of discrimination and the state. Indeed, the duties and burdens imposed by these statutes on private owners may plausibly find their grounds not among all members of the polity, but rather between the interacting parties in particular (say, the employer/employee, landlord/tenant, and so on). This is, in my view, precisely what renders revolutionary the Civil Rights Act in matters of housing, employment, and public accommodation discrimination. For this very reason, it seems more accurate

9 As with other traditions, there may be reasons occasionally to deviate for the division of labor. Ackerman himself has suggested this much in Bruce Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies, and Income Redistribution Policy, 80 YALE L.J. 1093 (1971).

10 Cf. ACKERMAN, supra note 1, at 139.

11 Id. at 325.

12 In that, the civil rights revolution has moved way beyond the kind of state-action doctrine developed in Shelly v. Kraemer, 344 U.S. 1 (1948). In particular, Shelley failed to acknowledge the existence and importance of the private law dimension of equality and justice among individual persons. The Court held that judicial enforcement of racially restrictive covenants amounts to a violation of the vertical dimension of substantive equality, namely, the dimension that captures the relationship between the state (acting through the courts) and the persons excluded by such covenants. The Fourteenth Amendment’s equal protection clause constitutes the doctrinal expression of this proposition. However, resort to constitutional law alone misses the significance of the private law that ought to
to say that the private law, rather than constitutional law, is the site of the revolution in question.\textsuperscript{13}

To be sure, the question of whether the civil rights revolution belongs to either private or constitutional law is no mere intellectual curiosity. It can make a difference along different dimensions. To begin with, consider those who take seriously the study of law including, in particular, the historical, doctrinal, normative, and conceptual understanding of private law and its constitutional counterpart. It can also make a difference from the philosophical perspective of political legitimation. Arguably, the burden of legitimation might be heavier if the civil rights revolution should stand for the proposition that the institution of private ownership must accommodate some, non-trivial demands of substantive equality or that contract law can no longer adhere to formal equality as its regulative ideal—Robert Bork’s famous critique of the Civil Rights Act makes precisely this point, arguing that the law should not “tell [private individuals] they may not act on their racial preferences in particular areas of life.”\textsuperscript{14} There may be other important theoretical and practical implications for the private/constitutional law distinction.\textsuperscript{15} Let me raise one more since it engages most directly with one of Ackerman’s basic claims—that much of our present and future engagement with the law turns on how we go about canonizing past legal precedents and principles. My proposed view (that, to an important extent, the Civil Rights Act has constituted a revolution in the private law) gives us reason to move beyond the tendency to overlook, dismiss, or exclude private law from the law’s most fundamental canon. This conclusion, moreover, strikes an intuitive chord—our horizontal interactions are no less, and sometimes possibly even more, important than our vertical ones.

govern the terms of the interaction between the individual persons concerned. One of the basic difficulties with the Shelley ruling underscores the importance of private law’s justice: Racially restrictive covenants are voidable if, and only if, their enforcement is pursued through the courts. By implication, then, these covenants are not illegal per se, and the same holds with respect to their private enforcement. This flaw is the product of a failure to appreciate the freestanding dimension of justice underlying the private law.

\textsuperscript{13} There is also a second-order revolution of private law that Ackerman’s account helps to render vivid—the legal technology by which private law’s substantive rights and duties are being enforced and redressed is no longer restricted to traditional court litigation (\textit{see especially id. at chs. 8-9}). Of course, one could protest, insisting that this turn represents the negation of private law. It is beyond the scope of the present argument to explain why this worry fails. For a very rough sketch, see Hanoch Dagan & Avihay Dorfman, The Justice of Private Law (unpublished manuscript) at pp. 36-37 available at \texttt{http://ssrn.com/abstract=2527970}.


\textsuperscript{15} One such implication has to do with delineating the appropriate scope of application of the First Amendment’s right to freedom of association (\textit{see Boy Scouts of America v. Dale}, 530 U.S. 640 (2000)) in the light of the civil rights revolution.
B. WHAT IS SPHERICAL EQUALITY?

Ackerman’s account makes it clear what principle of equality the American people had sought to displace by enacting the Civil Rights Act: Formal quality.\(^\text{16}\) It is less clear, however, precisely what principle of equality has been invoked in its stead. In particular, Ackerman mentions two different articulations of the “real-world”\(^\text{17}\) equality that underlies the Civil Rights Act. There is the familiar wholesale principle of fair equality of opportunity with its different variations (such as those developed by Rawls, Dworkin, and elsewhere by Ackerman himself). By contrast, in his interpretation of Brown and the civil rights statutes that followed its path, Ackerman suggests that the American people opted for “spherical equality.” By resorting to spherical equality Ackerman seeks to capture two intimately related key features that might set it apart from the wholesale principle of fair equality of opportunity: First, its scope of application is limited to one sphere at a time, resisting the more radical ambition of achieving fair equality of opportunity at a wholesale level\(^\text{18}\); and second, by implication, the normative baseline against which to determine what counts as genuine equality is fixed by reference to the life and logic of the particular sphere, to the exclusion of considerations of inequality that arise in connection with other spheres.\(^\text{19}\) Ackerman, once again, observes that spherical equality, rather than the wholesale principle of fair equality of opportunity, underwrites the civil rights revolution.

However, there is an ambiguity running throughout the argument. Ackerman is not clear as to the nature of the connection between the two articulations of real equality just mentioned.\(^\text{20}\) In particular, it is not clear whether or not the notion of spherical equality is a strategy—perhaps, at that point, the most legitimate and effective one—through which to advance the American society toward the ideal of fair equality of opportunity across and, indeed, beyond spheres. The alternative is that spherical equality is a freestanding ideal of equality that might or might not exert pressure toward tension with wholesale fair equality of opportunity (on which more below). Support for the former reading can be found toward the end of the Book in

\(^{16}\) To forestall misunderstandings, private law norms of formal equality allow, rather than eliminate, racial discrimination. The reason that discrimination, say, in the context of housing is consistent with formal freedom and equality is this. On the formal version of just terms of interactions, the owner possesses the liberty to take another’s race (or any other trait) as a relevant consideration. Her decision as a private owner not to lease her property to you does not offend against your negative freedom because the decision has merely changed the context within which you can still exercise your capacity for choice (you can try your luck with other owners or join a government-run program of public housing). And for that reason, the owner’s decision does not undermine formal equality at all, since you and her are equally independent so that neither of you is in charge of the other.

\(^{17}\) ACKERMAN, supra note 1, at 133.

\(^{18}\) Id. at 130, 133.

\(^{19}\) For an exception that proves the rule (of sphere separation), see id. at 326.

\(^{20}\) Perhaps this ambiguity is inevitable insofar as Ackerman’s argument from spherical equality is historical. However, I focus on his philosophical reconstruction of the historical emergence of the notion spherical equality.
Ackerman’s discussion of the plight of undocumented immigrants\textsuperscript{21} and of the need to enact “a new series of landmark statutes” in order to realize the demands of “real equality of opportunity.”\textsuperscript{22} But there may be evidence to the contrary as when he criticizes the “conventional views that look upon Brown as a way station on the road to grander theories of equal protection.”\textsuperscript{23}

But there is a more important question that arises in connection with Ackerman’s presentation of spherical and wholesale equality. My claim is that regardless of Ackerman’s historical account of the connection between them, there are reasons to believe that the idea of spherical equality may not be reducible to wholesale equality (and so may not be viewed as a way station toward the latter). As will become clear in due course, the reason for this tracks the preceding discussion (concerning the site of the civil rights revolution). I shall mainly focus on the ideas of relational and distributional equality, viewing Ackerman’s “spherical equality” as a contextual manifestation of relational equality and “real equality of opportunity” as synonym for distributive equality. I argue that while both are necessary for a society to count as just, relational and distributional equality reflect different (and sometimes competing) dimensions of the more abstract ideal of social justice.

To begin with, one might suspect that relational and distributional equality share more than just the rejection of formal equality. Relational equality, it may be thought, is essentially a form of distributional equality. A suspicion of this sort reflects a tendency among some prominent liberal egalitarians to cast virtually all questions of equality in distributive terms. On this approach, equality is, at bottom, a distributive value so that a theory of equality is primarily an account of the equalisandum, which is the kind of thing (resource, welfare, etc.) whose equal distribution produces justice. That said, relational equality is no mere principle of distributive equality.

Indeed, relational equality concerns the terms of the relationships between individuals. Distributive equality focuses on considerations of justice in the holdings of persons, taken severally. The different normative orientations just mentioned are not merely theoretical. Rather, the distributive implications of establishing relationally equal terms of interaction need not be compatible with the demands of distributive equality.

Consider the case of workplace accommodation by illustration. Demanding the employer to accommodate, to a reasonable extent, some of the personal qualities and circumstances of the employee need not pass the bar of distributive equality. It might be necessary, from the point of view of fair distribution of burdens and benefits, to impose the costs of accommodation on the entire class of taxpayers, according to a criterion of desert, responsibility, or any other just method of meritorious assessment.

\textsuperscript{21} Id. at 335-36.

\textsuperscript{22} Id. at 338. See also id. at 339-40.

\textsuperscript{23} Id. at 143.
Thus, let’s stipulate that relational equality demands that our employer accommodate, to a reasonable extent, the physically-disabled employee (or, for that matter, his racial identity, religious creed, or familial commitment). Whether or not this demand can be justified on grounds of distributive equality depends on considerations that are not relevant to the employer/employee terms of interaction only. Some of these considerations will focus on the employee’s situation: For instance, the responsibility of the employee for how his disability came about—viz., whether through fault (no fault) or choice (no choice) of his own. Another relevant consideration would be the employee’s economic status—he or she can be relatively wealthy (including even in comparison to the employer’s socio-economic status). Other considerations will focus on the employer and on the distributive-based reasons for or against imposing the costs of accommodation on the employer’s shoulders in particular. For instance, all else is being equal, hiring a physically disabled person is commonly considered morally and socially desirable—for work is consequential to social and political integration. These and many other considerations of distributive equality or fairness determine what allocation of the costs associated with the employee’s choice and circumstances counts as distributively just. Relational equality, by contrast, focuses on the terms of the interaction between the employer and the employee. In particular, it focuses on what it means for the former to respect the latter—to take her seriously—by recognizing her as the person whom she actually is. It emphasizes the responsibility of the employer to make reasonable accommodation even when considerations of distributive equality will pull in other directions (as when they single out the responsibility of society as a whole or, in the appropriate case, the well-to-do employee to bear the costs of accommodation). Thus, relational and distributional equality are quite different forms of non-formal equality. This difference, moreover, is institutionally manifested in the different dimensions they each happens to capture: whereas the former governs the horizontal interactions between agents, the latter regulates the vertical interactions between the distributing agent, which is typically the welfare state (acting on behalf of society as a whole), and its patients.

Against this backdrop, it seems to me that Ackerman must elaborate more on the concept of spherical equality and, in particular, on the implications it may carry for the pursuit of wholesale equality of opportunity. Further, more must be said concerning the distinction between private and public law and, ultimately, their respective ideals of justice. And since Ackerman is right to emphasize the influence that past legal achievements (properly conceived and canonized) has on our present understanding, and future vision, of the law, the ambiguity surrounding the idea of spherical equality should be addressed.