

Contents

Acknowledgements and Disclaimers — XIX

Introduction — 1

- I The Horizontality Revolution — 1
- II Two Histories, Four Questions, Twelve Cases, Two Scholarly Debates — 6
- III Liberal Democratic Constitutionalism — 13
- IV Liberal Democratic Sovereignty — 19
- V Liberal Democratic Historicity — 21
- VI Liberal Democratic Constitutional Review — 25
- VII Outline of Arguments and Chapters — 31

Part One: Horizontal Effect

Chapter One: Erased Baselines and Inversed Coordinates: 19th Century Backgrounds of the Horizontality Question — 37

- I Introduction — 37
- II The Privatisation of Constitutional Rights in America — 41
- III The Nineteenth Century Transformation of Private Law Rights in America — 48
- IV The Privatisation of Constitutional Rights in Germany — 59
- V The Nineteenth Century Transformation of Private Law Rights in Germany and its Impact on Early Twentieth Century German Public Law — 66
- VI The Baseline of Erased Baselines — 74
- VII Inversed Coordinates — 78

Chapter Two: Twelve Pivotal Cases — 85

- I Introduction — 85
- II *The Civil Rights Cases* (and their Unlikely South African Echoes) — 86
- III *Shelley v Kraemer* — 92
- IV *Labour v Swing* and *New York Times v Sullivan* — 98
- V *RWDSU v Dolphin Delivery Ltd* — 102
- VI *Lüth* — 107

VII	<i>Du Plessis v De Klerk</i> — 114
VIII	<i>Flagg Brothers, Inc. v Brooks</i> — 120
IX	<i>DeShaney v Winnebago County Department of Social Services</i> — 124
X	The Duty to Protect: <i>Roe v Wade</i> and <i>Erste Abtreibung</i> — 130
XI	<i>Reiten im Walde</i> — 151
XII	Summary Reflections — 155
1	Vicissitudes of the State Action Doctrine — 155
2	The Contradictory Legacies that Informed <i>Du Plessis</i> — 156
3	The Dismantling of <i>Swing, Shelley</i> and <i>Sullivan</i> in <i>Flagg Brothers</i> and <i>DeShaney</i> — 157
4	Shifting Horizontal Effect Jurisprudence from Private to Legislative Relations — 157
5	Substantive and Procedural Due Process and the Question of Sovereignty — 158
6	Constitutional Histories of Peoples — 163

Chapter Three: State Action — 166

I	Introduction — 166
II	Michelman's "Hohfeldian Point" — 168
III	Wechsler and Tribe: Two Readings of <i>Shelley</i> — 172
IV	Seidman's Reading of <i>DeShaney</i> — 181
V	One Way out of the American Conceptual Impasse — 190

Chapter Four: *Drittwirkung* — 201

I	Introduction — 201
II	Nipperdey's Position — 203
III	Dürig's Position — 207
IV	Leisner's Position — 212
V	Schwabe's Position — 222
VI	Canaris' Response — 227
VII	Schutzpflicht and/or <i>Drittwirkung</i> ? — 230

Part Two: Sovereignty

Chapter Five: Uninterrupted Sovereignty — 235

I	Introduction — 235
II	Divided Sovereignty — 241

III	Between Deism and Deontology – Europe and Ordo-Liberalism — 246
IV	Dispersed Sovereignty – Government and Governance — 252
V	Dispensed Sovereignty – The Davidsonian Road to Luhmann — 260
VI	Uninterrupted Sovereignty – A “Luhmannian” Return to Hegel — 275

Chapter Six: Différential Sovereignty — 293

I	Introduction — 293
II	Coercive Enlightenment Ideals — 296
III	Carl Schmitt’s Unitary Substantive Due Process and Indirect Horizontal Effect Jurisprudence — 300
IV	Hans Kelsen and the Open Duality of the Constitutional Democratic Whole — 315
V	Leisner’s “Kelsenian” Horizontal Effect Jurisprudence — 323
VI	Différential Sovereignty — 327

Chapter Seven: Sovereignty and the Dual Destiny of *Lüth* in Europe — 334

I	Introduction — 334
II	The Rise of European Union Sovereignty — 338
III	The Demise of German Sovereignty and the Marginalisation of <i>Lüth</i> in Germany — 348
IV	European Union Sovereignty – Vertical and Monistic or Horizontal and Différential? — 352

Chapter Eight: Liberal Democratic Constitutional Review — 361

I	Introduction — 361
II	The Recognition of Sovereignty — 366
III	Liberal Democratic Sovereignty — 368
IV	Substantive and Procedural Due Process Constitutional Review — 369
V	The Proceduralisation of Minimum Substance and the First Proportionality Question — 374
VI	The Second Proportionality Question: Rationality and Effectiveness — 379
VII	The Third Proportionality Question: Minimal Intrusion — 381
VIII	The Difference between Ordinary and Constitutional Law — 386
IX	Social Liberal Democracy? — 390

Bibliography — 401

Abbreviations — 419

Index of Persons — 420

Subject Index — 423