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India

Citizens' Duties in Aspiring to Equality

Despite a range of interpretations of what the Fourteenth Amendment requires and permits, doctrinal practice in the United States remains wedded to a dividing line between public and private, between state and nonstate action. Some provisions of the Indian Constitution likewise stipulate that certain rights control only state action, and some constitutional interpreters have indeed foregrounded such provisions. However, more capacious interpretations of rights, indeed of rights as ends, have contributed to the official constitutional story from its earliest days. From arguments of key framers to later Supreme Court judgments, Indian constitutional discourse often understands rights as requiring more for their protection and fulfillment in comparison with American rights. Amid yet another history tainted by inequality and caste, such crucial political figures as Dr. B. R. Ambedkar, who himself was a Dalit, aimed to fashion a constitution that would break down divisions and ameliorate discrimination. Hence, several constitutional provisions admitted space for the possibility that rights be grounded in larger constitutional ends from which private actors were not necessarily insulated. Examining Indian constitutional arguments through this book's republican framework reveals a theoretic potential in the discourse. Indeed, various episodes since the Constitution's adoption in 1950 have been marked by arguments echoing concepts like a common good and duties of citizens. All this has occurred in a context where, like the United States, the reach and nature of equality itself hung in the balance.

In the same way that the US debate cannot be summed up solely in terms of state action or verticality, neither does the Indian debate show an uninterrupted trajectory toward horizontality. Not all of the Indian framers, much less the array of constitutional actors since the Constitution's adoption, subscribed to the same vision of equality, nondiscrimination, and social justice for India. In the years leading up to the Constitution's framing, Jawaharlal Nehru, the independence activist and first prime minister, acknowledged that the Indian constitutional

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moment might be born of merely a "semi-revolutionary situation."[1] Nehru thus showed some confidence that India was approaching the moment in which it would reconstitute itself, as well as a kind of realism that the impetus for such a revolution likely would not pervade the country as a whole. He was right; many did remain tied to structures of oppression that ran contrary to the eventual constitutional vision.[2] Picking up on this idea of a "semi-revolutionary situation," Jacobsohn and Roznai further suggest that the Indian polity at the time of independence might have been comprised of only "a semi-revolutionary people."[3] Even by the time the framers adopted and drafted the Constitution, they point out, divergent strands of thought and conflicting positions contributed to the final document – some supported the project of secularism and equality, while others were inclined to constitute the country on the basis of Hindu nationalism. Even into the twenty-first century, scholars find both transformative and more nationalist conservative interpretations of the Indian Constitution among political actors and institutions.[4]

In addition to this different interpretation vis-à-vis the place of equality and nondiscrimination in the Constitution, Granville Austin describes competing understandings of the very content and requirements of these rights. This comes in his account of three "strands" underlying the Indian Constitution's philosophy: "protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; and fostering a social revolution to better the lot of the mass of Indians."[5] While many observers and constitutional actors understood these three to be "mutually dependent and inextricably intertwined,"[6] these strands also would come to exist in some tension.[7] Most relevant to this book, the traditional rights that one might associate with the second strand's "institutions and spirit of democracy" did not always sit comfortably with the third strand's more ambitious goal of "social revolution." While

[1] Presidential Address to the Indian National Congress, Lucknow, April 12, 1936.
[2] Gary Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (New Haven: Yale University Press, 2020), 153–154.
[3] Ibid., 153.
[4] Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India," *Law and Ethics of Human Rights* 14:1 (2020), 49–95; Gautam Bhatia, *The Transformative Constitution* (Uttar Pradesh: HarperCollins, 2019), xx–xxvii.
[5] Granville Austin, *Working a Democratic Constitution* (Oxford: Oxford University Press, 1999), 6.
[6] Ibid.
[7] Ibid., 38.

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the former was manifested in the Constitution primarily in Part III's guarantees, such as equality, the latter appeared in Part IV's Directive Principles, including the call to institute affirmative action programs (known as reservations) to benefit those populations who were subjected to discrimination.[8] Although the Directive Principles of Part IV were technically nonjusticiable, they were essential to understanding the constitutional vision as a transformative one, charging the state to transcend traditional formulations of rights in favor of more substantive ends across Indian society.[9]

Austin's account, therefore, anticipates both a static element and a dynamic element in the new constitution. Whereas the static provision for, say, the right to equality in Part III, Article 14 would by itself support a more conservative tendency, a more aspirational substantive equality, what Marc Galanter calls the Constitution's "compensatory theme,"[10] arguably comprises a more comprehensive and dynamic vision. Figures like Ambedkar and Nehru, who sought transformation, urged that the Indian project could only be realized fully in recognizing the dynamic element, thus contending "step by step" with a still-unreceptive political culture.[11] These two elements are likewise present in ensuing jurisprudence of the Indian Supreme Court, which displays both conservative and transformative bents in the handful of decisions in which it has confronted the horizontal application of rights to private actors.[12]

In the interest of taking stock and thinking comparatively, in the United States we saw a kind of crescendo of disharmony in constitutional discourses over time, as the limited equality that prevailed in the *Civil Rights Cases* (*pace* the Radical Republicans) did not rest easily with the

[8] These Directive Principles largely reflect what Ambedkar would refer to as "economic democracy" (*Constituent Assembly Debates, Vol. 7* [New Delhi: Lok Sabha Secretariat, 1986], 494). And indeed, many provisions among these Directive Principles were included as an effort to keep members of the socialist party at the negotiating table during the Constituent Assembly debates.

[9] In many ways, this division between Parts III and IV of the Indian Constitution tracks what might have been in the US context had constitutional actors pushed for a decoupling of Sections 1 and 5 of the Fourteenth Amendment. Specifically, the US Supreme Court might have been charged with upholding a more formal understanding of equality under Section 1, whereas Congress might have assumed the role of realizing something more, perhaps a kind of substantive equality, under its Section 5 enforcement powers.

[10] Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley: University of California Press, 1984), 381, 364. See also Jacobsohn and Roznai, *Constitutional Revolution,* 173.

[11] Jacobsohn and Roznai, *Constitutional Revolution*, 145.

[12] Bhatia, *The Transformative Constitution*, xx–xxvii.

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way understandings of equality shifted during the Civil Rights Movement of the 1960s. In contrast, we see disharmony at the very start in India, in the juxtaposition of Ambedkar's and Nehru's aspirations with the broader political situation that promised to hamper their vision. Whereas disharmony between public discourses and the official constitutional line proved to be a kind of terminus in America when the US Supreme Court would not revisit the reach of equality during the sit-in protests, it is better characterized as a discursive starting point in Indian constitutionalism since, for many, nondiscrimination and fraternity were ends toward which the country needed to strive but that required more than what some sectors of the polity would permit.[13]

It is in a similar spirit that Jacobsohn and Roznai identify a kind of "step by step revolution" in India, involving both "steps backwards and forwards,"[14] that incrementally furthered more ambitious understandings of the constitutional project at least in certain moments.[15] This same understanding led the Indian framers to provide for horizontal application in several constitutional provisions. Moreover, much about the early constitutional debates possessed a republican valence,[16] sometimes explicitly so. Both during the framing and in later episodes of constitutional politics, such republican proclivities can be seen in arguments about transcending more limited understandings of equality and extending duties beyond state actors to involve private actors as well. Likewise,

[13] Contrast this with Jaffa's early account of the American Framers whose Lockean foundations took equality to be a kind of status quo that could be taken for granted. On Jaffa's telling, it was only with Lincoln's subsequent interpretation that equality came to mean more – indeed, it became an end toward which the polity continually needed to work (Harry Jaffa, *Crisis of the House Divided* [Chicago: University of Chicago, 2009], chap. 14).

[14] Jacobsohn and Roznai, *Constitutional Revolution,* 149.

[15] Two decades into the twenty-first century and with a regnant BJP, many political observers and scholars are more cynical of whether Indian politics will fulfill its more expansive constitutional promises into the future.

[16] In contrast with the many accounts that portray India as departing from traditional liberal understandings, Rochana Bajpai ("Liberalisms in India: A Sketch," in *Liberalism as Ideology: Essays in Honour of Michael Freeden*, ed. Ben Jackson and Marc Stears [Oxford: Oxford University Press, 2012]) and C. A. Bayly (*Recovering Liberties* [Cambridge: Cambridge University Press, 2012]) do find liberal elements in Indian political history. Specifically, Bajpai identifies colonial, nationalist, and radical liberal strands running through different eras of the polity's constitutional thought. However, her account encompasses liberalisms of the welfarist variety that are more democratically inclined and often critical of laissez-faire postures. Put differently, the variants of liberalism that Bajpai finds are those that are more likely to find common ground with much in republican theory.

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the handful of cases in which the Court has considered horizontal application have often cast the issues at stake in terms that may be conceived of as republican, often deployed in service to transformative understandings of the constitutional project. Indeed, the foundations for such ends-oriented arguments that support horizontal application were established with the 1950 Constitution.

At the same time, arguments less amenable to transformative interpretations, including those respecting horizontal application, persist in constitutional discourse. In certain ways, a continued diversity in the discourse is more conspicuous in Indian constitutional history than in other contexts this book considers insofar as the Indian Supreme Court decides cases in panels, called benches, selected by the chief justice, rather than *en banc*. In other words, only a few justices at a time, rather than the whole thirty-four member court,[17] will typically be charged with deciding a case. Outcomes are thus largely contingent on the composition of those benches and make more tenuous any claims about the court's doctrinal trajectory. Nevertheless, for the purposes of this book, the practice of deciding cases in benches may put more constitutional understandings on the table for examination. Doctrinal trends may be more difficult to locate, but discursive threads across eras and court cases are quite discernible.

This context engenders arguments similar, in both range and substance, to those that Chapter 3 examined in the United States. Indeed, what follows shows a continual choice in Indian constitutionalism between more transformative and conservative constitutional discourses, with the former generally correlating with the horizontal application of rights. Nevertheless, this chapter also reveals new discursive possibilities when the horizontal application of a range of equality and nondiscrimination rights is more explicitly provided for in the constitutional text and framers' visions. Of course, a court's choice to pursue a more transformative or restrained line cannot but be influenced by such contingencies as institutional strength (or limitations, as the case may be) and political will.[18] However, pursuant to this book's project to take constitutional

[17] This reflects the number of judges on the court, including the chief justice, as of the 2019 Supreme Court Amendment Act. At the time of the Constitution's adoption, the Court comprised eight judges, including the chief justice, and did sit *en banc*.

[18] The Indian Supreme Court is often counted among the strongest in the world. See, for example, Michaela Hailbronner, "Transformative Constitutionalism: Not Only in the Global South," *American Journal of Comparative Law* 65:3 (2017), 547–548; and Stephen Gardbaum, "What Makes for More or Less Powerful Constitutional Courts?"

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discourses as the focus, the primary concern here is to foreground more theoretic lessons, highlighting the potential republican lines of thinking as Indian constitutional actors, operating amid pervasive inequality, contemplate how the horizontal application of rights might grow out of the constitutional project. From cases ranging from labor to education emerge an interpretation of the Constitution as a far-reaching and public project, where public values are not constrained to particular rights formulations, issues, or spheres but potentially implicate all corners of life and a vast cross-section of the Indian populace.

Freedom and Fraternity: Drafting a New Constitution

The Indian independence movement's leaders and constitutional framers sought unity and equality in the country's founding.[19] A decade after independence, Nehru articulated the new constitutional project as "to promote fraternity, assuring the dignity of the individual and the unity of the nation."[20] "Fraternity" was thus considered a major factor in securing individual dignity and rights, to say nothing of the very unity of the newly constituted polity.

This same idea, that relations between citizens are crucial to the success of a democratic India, runs through the deliberations preceding ratification.[21] Members of the Subcommittee on Fundamental Rights believed that citizens' duties should not be neglected amid so much discussion of rights. K. T. Shah cautioned that "the constitution would be incomplete, and even futile, if equal stress were not laid on obligations

Duke Journal of Comparative & International Law 29:1 (2018), 31–36. Nevertheless, some scholars dispute whether this account holds in such historical moments when having a strong court would count the most – for example, when the government has taken authoritarian turns during the Emergency Era and during the BJP's present dominance. Even the 1978 Maneka Gandhi case, frequently cited as a great turning point for the Indian Supreme Court, has certain limitations in that the petitioner did not have her passport returned to her after the government had seized it arbitrarily (remote interview with Gautam Bhatia, March 24, 2021). Regardless of how one comes down on the actions of the Indian court, as with any court, it cannot but be influenced by the larger constitutional politics of any given moment.

[19] Manjeet Ramgotra, "India's Republican Moment," in *The Indian Constituent Assembly: Deliberations on Democracy*, ed. Udit Bhatia (New York: Routledge, 2018), 219.

[20] Ibid., 213.

[21] See, for example, Shiva Rao, *The Framing of India's Constitution: Selected Documents, Vol. II* (Bombay: N. M. Tripathi, 1966), 38–48.

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corresponding to rights,"[22] and that "every one of these rights [in the draft Statement of Fundamental Rights] would be impossible to realise, unless, side by side, toleration is cultivated and enforced."[23] Shah goes on to develop this idea in a way that makes it immediately relevant to the subject of horizontal application, speaking of "the seeming conflict in certain rights due, so to say, to the right of one person or of one group becoming the obligation of another."[24] This explanation of a "conflict between rights" and of rights becoming "the obligation of another" gets to the heart of horizontality's republican character, as it generates new duties in a liberal context.

Throughout these deliberations, the framers seemed to be more concerned with cultivating a culture of mutual obligation among fellow citizens than a more specific doctrinal understanding of horizontality as it might develop in constitutional law. That many of the framers sought a culture of fraternity and understood private actors as having obligations to one another is a far cry from the state action requirement through which equality came to be understood in the American context. And indeed, the United States' experience with equality (and inequality) had a direct influence on this stage of drafting of Indian constitutional rights to equality.[25] In his draft articles and notes, the Father of the Indian Constitution himself voiced concern to avoid the discrimination that had lingered in the United States as a result of constitutional actors' formulations of divides between private and public, state and nonstate action. B. R. Ambedkar's draft articles explicitly dealt with access to public accommodations, eligibility for various offices, and the like.[26] In his notes on these particular draft articles, Ambedkar states that he borrowed language for some of the provisions from the Civil Rights Acts

[22] Ibid., 38. This general emphasis on duties would manifest further when the Forty-Second Amendment to the Constitution would incorporate certain fundamental duties of citizens (see Article 51A of the Indian Constitution). Though not justiciable by themselves, the Supreme Court has rendered these fundamental duties justiciable through ordinary law or when attached to a fundamental right (Mahendra Singh, "India: Protection of Human Rights against State and Non-state Action," in *Human Rights in the Private Sphere*, ed. Dawn Oliver and Jorg Fedtke [Abingdon: Routledge-Cavendish, 2007], 181–182).

[23] Rao, *The Framing of India's Constitution, Vol. II*, 39.

[24] Ibid., 40. See also 38–48.

[25] P. K. Tripathi, "Perspectives on the American Constitutional Influence on the Constitution of India," in *Constitutionalism in Asia: Asian Views of the American Influence*, ed. Lawrence Beer (Baltimore: University of Maryland School of Law, 1988), 78.

[26] Ibid.; Rao, *The Framing of India's Constitution, Vol. II*, 86.

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of 1866 and 1875, "passed by the Congress of the United States of America to protect the Negroes against unequal treatment."[27]

Whereas in the American context Justice Bradley worried that these laws would force whites to endure "another kind of slavery"[28] and Justice Black later worried that reading the Fourteenth Amendment to guarantee equal access to public accommodations would limit liberty too much, Ambedkar and others in the Subcommittee on Fundamental Rights were intent not to understand equality simply in terms of private and public. In Ambedkar's own words, "Discrimination is another menace which must be guarded against if the fundamental rights are to be real rights. In a country like India where it is possible for discrimination to be practiced on a vast scale and in a relentless manner fundamental rights can have no meaning."[29] In this way, deliberations during the constitutional drafting and subsequent debates often understood equality as necessitating at least some cooperation from private actors.

The Subcommittee on Fundamental Rights did not ultimately adopt Ambedkar's draft articles, but did bring articles before the Constituent Assembly that aimed at securing the right to equality, including the prohibition of discrimination in public accommodations (Article 15), untouchability[30] (Article 17), *begar*[31] and forced labor (Article 23), and child labor (Article 24). Insofar as the problem of inequality did not distinguish between spheres of life, so too did these provisions presume to bring the new public commitments to equality and nondiscrimination into private spaces.[32] Many framers' preoccupation with encompassing private entities in the constitutional plan, and particularly the

[27] Rao, *The Framing of India's Constitution, Vol. II*, 96; Tripathi, "Perspectives on the American Constitutional Influence," 78–79.

[28] Jack Balkin and Sanford Levinson, "The Dangerous Thirteenth Amendment," *Columbia Law Review* 112:7 (2012), 1472.

[29] Rao, *The Framing of India's Constitution, Vol. II*, 96; Tripathi, "Perspectives on the American Constitutional Influence," 78–79.

[30] The Civil Rights Act of 1955 implemented Article 17 by making untouchability an offense and creating a mechanism for prosecution (Sudhir Krishnaswamy, "Horizontal Application of Fundamental Rights and State Action in India," in *Human Rights, Justice, & Constitutional Empowerment*, ed. C. Raj Kumar and K. Chockalingam [Oxford: Oxford University Press, 2007], 52).

[31] *Begar* is a system of forced labor historically practiced in India.

[32] Citing Article 15(2) and Article 21 (guaranteeing the right to life), Krishnaswamy explains that "the majority of rights are expressed in broad and general terms and ambivalent about who they are addressed to." He continues to explain that Articles 17, 18, and 23 expressly impose constitutional obligations on nonstate actors (Krishnaswamy, "Horizontal Application of Fundamental Rights," 52).

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commitment to nondiscrimination, is evident in Article 15. This Article prohibits discrimination in two separate clauses: one aimed at the state, and the other aimed at private individuals or nonstate actors. Both clauses employ the same language and specify the same protected categories: "religion, race, caste, sex, place of birth or any of them."[33] Though these clauses possess almost identical content, the framers nevertheless thought it necessary to include both in the final Constitution, with Sardar Vallabhbhai Patel going so far as to say both were "absolutely essential."[34]

In some ways, however, the inclusion of two separate clauses – one obligating state entities, and another private nonstate entities – complicates the story. On the one hand, the fact that the framers thought it was necessary to specify that a right obligated the state suggests a departure from the traditional model in which one could assume that rights only *ever* obligated the state.[35] On the other hand, implicit in the fact of these separate clauses is the idea that private and public entities are distinct, and perhaps that their obligations are different. Indeed, Patel describes prohibitions of private discrimination in arenas like restaurants and hotels as "a completely different idea" from the state's obligation not to discriminate.[36] Moreover, in detailing additional private establishments, such as "wells, tanks, bathing ghats, roads and places of public resort," Article 15(2b) prohibits discrimination only in situations in which these establishments are "maintained wholly or partly out of State funds or dedicated to the use of the general public."[37] Similarly, Article 14 guaranteeing equality before the law has a state action requirement.

[33] See Article 15, clauses 1 and 2, of the Indian Constitution; *Constituent Assembly Debates, Vol. 3* (New Delhi: Lok Sabha Secretariat, 1986), 426; Stephen Gardbaum, "Horizontality in the Indian Constitution," in *The Oxford Handbook of the Indian Constitution*, ed. Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (Oxford: Oxford University Press, 2016), 603; see also the discussion on gender and "social equality" in Rao, *The Framing of India's Constitution, Vol. V*, 185.

[34] *Constituent Assembly Debates, Vol. 3* (New Delhi: Lok Sabha Secretariat, 1986), 426; Gardbaum, "Horizontality in the Indian Constitution," 603.

[35] Singh, "India: Protection of Human Rights," 188–189.

[36] Ibid..

[37] T. K. Raj offers a compelling interpretation of this antidiscrimination provision as prohibiting discrimination in the context of "public services," that is, "those services vital to modern social life such that their deprivation would seriously disadvantage a dignified life" ("Private Discrimination, Public Service and the Constitution," *Indian Law Review* 6:1 [2022], 34).

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The text reads: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Though the framers maintained ambitious ideas of the duties of citizens, they still distinguished between state and nonstate actors in matters of law and politics.

The framers were unlikely to collapse the categories of public and private completely given how this distinction largely defines liberalism and given the generally different capacities of state and nonstate actors.[38] Indeed, as in other jurisdictions, the importance of the distinction decreases as the means and power of private entities increase.[39] Nevertheless, the Indian framers' recognition of some distinction between public and private actors created ground on which a young Supreme Court would argue against horizontal application, at least in particular instances if not writ large. At the same time, much in these early constitutional debates reflects a kind of republican vision of the polity's problems that the Constitution was designed to address with its attendant duties of citizens. Likewise, the debates and ultimate text do not contain anything quite like the Centrist Republicans' understanding in postbellum America that drove a wedge between social and civil rights. Rather, the debates reveal comparatively broad consensus during the framing of the Indian Constitution that a right to nondiscrimination required both.[40] Discrimination from any corner of society had to be fought if fundamental rights were to be "real rights" and "have meaning."[41] In this way, Ambedkar and other Indian framers articulated a conception of the Constitution as transformative and, as such, necessarily dynamic. And while traditional understandings about the requirements of equality and nondiscrimination remained present in the discourse, a larger role for private actors in realizing such rights of fellow citizens gained new momentum in constitutional understandings.

[38] Legal theorists have argued in various ways that the state's heightened constitutional duties do not necessarily entail that private actors are immune to constitutional commitments. See, for example, Nicholas Bamforth, "The Public Law–Private Law Distinction: A Comparative and Philosophical Approach," in *Administrative Law Facing the Future: Old Constraints and New Horizons,* ed. Peter Leyland and Terry Woods (Oxford: Blackstone Press, 1997), 136–159; and Tarunabh Khaitan, "The Duty Bearers," in *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015), 195–213.

[39] Singh, "India: Protection of Human Rights," 191.

[40] Rao, *The Framing of India's Constitution, Vol. V*, 185.

[41] Ibid., 96; Tripathi, "Perspectives on the American Constitutional Influence," 78–79.

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The Conservativism of the Early Supreme Court

That the Constitution distinguishes between private and public spaces, and between state and nonstate actors, figured into some of the Supreme Court's earliest decisions. These followed other countries' practices, and the conventions of constitutionalism more generally, to confine the application of rights to the state.[42] Early decisions conforming to this conventional understanding include *PD Shamdasani v. Central Bank of India* (1952)[43] and *Vidya Verma v. Dr Shiv Narain Verma* (1956).[44] Nevertheless, these are also ambiguous cases, insofar as the constitutional language alone offers interpretive space in which the Court might have applied the rights in question to private actors had they been so inclined. In these early cases, however, the Court employed a kind of canned understanding of constitutionalism, with only perfunctory consideration of how the Indian Constitution might call for something more or something different. Quoting an earlier case, Justice Bose writes in *Vidya Verma,* "[A]s a rule constitutional safeguards are directed against the state and its organs and that protection against violations of rights by individuals must be sought in the ordinary law." Sudhir Krishnaswamy describes this approach as "stipulative and unreasoning" for its inattention to how the constitutional text and its theoretical basis could lead to a different understanding of the scope of fundamental rights.[45] Indeed, it takes as granted conventional accounts of constitutionalism, conceiving of rights as creating a relationship between individuals and the state, and

[42] Singh, "India: Protection of Human Rights," 189.

[43] *PD Shamdasani v. Central Bank of India,* AIR 1952 SC 59. "The petitioner was aggrieved by the bank's sale of his shares to recover a debt owed by him." He petitioned the court by a writ action to enforce his fundamental right under the former Articles 19(1)(f) and 31 (1). Chief Justice Patanjali Shastri dismissed the petition on the basis that the language and placement of these constitutional provisions in Part III suggest they apply only to state action. As a side note, Articles 19(1)(f) and 31 were both amended out of the Constitution and replaced with Article 300-A (Krishnaswamy, "Horizontal Application of Fundamental Rights," 55–56).

[44] *Vidya Verma v. Dr Shiv Narain Verma,* AIR 1956 SC 108. The husband of the petitioner presented the Supreme Court with a habeas corpus petition to "release his wife from the custody of her father, alleging a violation of her fundamental right to life and liberty protected under Article 21." Justice Vivian Bose followed the Court's decision in *Shamdasani* to conclude that Article 21 was not intended to protect life and liberty against private individuals (Krishnaswamy, "Horizontal Application of Fundamental Rights," 56–57).

[45] *AK Gopalan v. State of Madras* (1950) SCR 88, 204; see also Krishnaswamy, "Horizontal Application of Fundamental Rights," 57.

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not considering that they might embody certain ends for the polity as a whole. Nevertheless, these two cases did not foreclose the possibility of such an understanding and the future development of horizontality insofar as they limited their analysis to the individual rights provisions in question "instead of deciding the issue wholesale."[46] In fact, later cases do show a Court understanding the polity's issues in more republican terms and embracing a dynamic constitutional project[47] aimed at more ambitious understandings.

In addition to resisting any move toward horizontal application at this early stage, the Court also resisted government efforts to make good on the new constitution's "compensatory themes," articulated in the Directive Principles that charged the government with working toward a more substantive equality. In *State of Madras v. Champakam Dorairajan*, the Supreme Court struck down a state initiative that reserved specific spaces in government jobs and universities for members of lower castes.[48] Whereas the State of Madras had relied on Article 46 of the Directive Principles[49] in pursuing this policy, the Supreme Court operated on a more narrow understanding of the ends of equality and nondiscrimination grounded in a prioritization of Article 16(2),[50] prohibiting discrimination, over other provisions in that same Article 16 that permitted greater complexity.[51] Similar to the early cases directly concerning horizontal application, the Court here chose to emphasize some aspects of the Constitution over others, maintaining that quotas in government jobs violated equality under the law. Further, whatever preference the Court already had toward a more conservative interpretation was reinforced all the more by the fact that the Directive Principles

[46] Krishnaswamy, "Horizontal Application of Fundamental Rights," 56.

[47] Jacobsohn and Roznai, *Constitutional Revolution*.

[48] *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226; see also Jacobsohn and Roznai, *Constitutional Revolution,* 173.

[49] This Article reads: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

[50] "No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."

[51] See, for example, Article 16(4): Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

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were nonjusticiable, in contrast with the equal protection of the laws and other such rights in Part III of the Constitution, the protection of which was clearly within the courts' purview.[52]

In response to such judgments "impeding the fulfillment of government's perceived responsibilities" under the Directive Principles,[53] parliament passed the Constitution Act of 1951. In this First Amendment to the Constitution, a parliament, largely composed of the same members that had drafted the Constitution,[54] pushed back against the Supreme Court's restrictive decision in *State of Madras v. Champakam Dorairajan*. The Amendment aimed to clarify a series of rights under Part III of the Constitution, including the rights to property and to equality, in order to preempt further claims that they somehow stood in the way of state-initiated reservation programs. In this way, such affirmative actions to assist historically deprived populations could not be challenged on the basis of discrimination.[55] Jacobsohn and Roznai explain this as "a step forward in the dialogical advancement of a dominant, if not indisputable, view about achieving distributive justice in the polity."[56] However, the Court did not take even a constitutional amendment as the final word on the question, waging an ongoing battle for power with parliament in the ensuing years.

A couple of decades, as well as several significant decisions and constitutional amendments, later, the Court had a considerable opportunity to push back against parliament in *Kesavananda Bharati v. State of Kerala*.[57] In this decision, the Court established what has become a crucial concept of Indian constitutionalism, known as the Basic Structure Doctrine, the idea that "specific features of the Constitution are deemed sufficiently fundamental to the integrity of the constitutional project to warrant immunity from drastic alteration."[58] The initial cause

[52] Jacobsohn and Roznai, *Constitutional Revolution,* 162–163.
[53] Austin, *Working a Democratic Constitution*, 97.
[54] Jacobsohn and Roznai, *Constitutional Revolution,* 173fn99.
[55] For a discussion on similar issues in the context of the United States, see Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown," *Harvard Law Review* 117 (2004), 1470–1547.
[56] Jacobsohn and Roznai, *Constitutional Revolution,* 174. It is worth noting that the First Amendment has a complicated history and has been employed to a range of ends. In fact, many Indian scholars and commentators view it as limiting certain rights, such as freedom of expression. I am grateful to Tarunabh Khaitan for calling my attention to this blended history.
[57] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.
[58] Jacobsohn and Roznai, *Constitutional Revolution,* 161.

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(and effect) of this decision was to declare that the Court in fact had power to determine if an amendment passed by parliament (specifically, the Twenty-Fourth and Twenty-Fifth Amendments) went so far as to destroy, rather than simply modify, the Constitution's basic structure. In particular, a narrow majority of the Court argued that while amendments could enact some limitations to individual rights, the Constitution permitted such limitations only to a point. The initial impetus for this judgment was, admittedly, to stem parliament's power against the judiciary. However, this same Basic Structure Doctrine would gain additional legitimacy when parliament did pass dubious constitutional amendments. Indeed, the doctrine has been often enlisted to the cause of a more capacious understanding of the Indian constitutional project, including the support of the Directive Principles and even the expansion of horizontal application.[59]

The Supreme Court thus assumed a fairly conservative posture in the years immediately following the Constitution's adoption. It conceived of individual rights in such a way as to deter parliament's efforts to enact transformative legislation and, moreover, insisted on a vertical model of rights that limited the influence of constitutional values in private spaces. Constitutional debates and particular provisions distinguishing between state and nonstate action rendered such early decisions against horizontal application viable.[60] Nevertheless, these readings did not accrue in Indian constitutional politics the same entrenched status we see in the more limited interpretations of equality that followed the United States' Fourteenth Amendment. Indeed, even if the state were the primary guarantor of rights, a larger project, grounded in the debates and constitutional text, aimed at the polity's more thorough transformation.[61] Citing such constitutional understandings, the Indian Supreme Court would ultimately give indirect horizontal application to Article 14's guarantee of "equality before the law" and "equal protection of the laws" *in spite of* its state action requirement and would not just support reservations but support them in private spaces, too. Nevertheless, it took years of political conflict and institutional consolidation before the

[59] Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court," *Washington University Global Studies Law Review* 8:1 (2009), 28–30.

[60] Such as *AK Gopalan v. State of Madras* (AIR 1950 SC 27), *PD Shamdasani v. Central Bank of India* (1952 AIR 59, 1952 SCR 391), and *Vidya Verma v. Dr Shiv Narain Verma* (1956 AIR 108, 1955 SCR (2) 983).

[61] Bhatia, *The Transformative Constitution,* 2019; Hailbronner, "Transformative Constitutionalism."

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Court began to make such arguments. Nehru might have explained this as part of the step-by-step revolution[62] that depended as much on political will as on the theoretic potential of the foundations established by the framers.

From Rights to Ends: Toward a Broader Constitutional Understanding

Eventually, the Supreme Court acknowledged a constitutional project more comprehensive than its early decisions suggested, specifically in reassessing the reach of rights in Part III of the Constitution.[63] As early as the 1963 case *State of West Bengal v. Union of India*,[64] the Court began to understand rights as also engendering a broad constitutional program. In this understanding, a right was "an obligation imposed not merely upon the 'State,' but upon all persons to respect the rights so declared, and the rights are enforceable unless the context indicates otherwise against every person or agency seeking to infringe them."[65] In this, we see an operative logic different from the aforementioned cases, in that certain rights might, in fact, create duties "for all persons" according to the commitments of the Constitution. In this way, at least some constitutional actors put greater weight on the requirements of particular articles of the Constitution and, not unlike many US cases, expanding the definition of "the State," per Article 12, to admit further application of rights even under a state action requirement.

In the wake of the Emergency Era of 1975–1977, the Court, chastened by its broad capitulation to executive power, was eager to reassert itself as a defender of all rights and not a mere instrument of the privileged.[66] Emboldened in this way, the Court acted to widen the application of fundamental rights, including through the horizontal application of certain constitutional rights. In *People's Union for Democratic Rights*

[62] Jacobsohn and Roznai, *Constitutional Revolution,* 166.

[63] As Krishnaswamy explains, the fact that early cases assessed the reach of *specific* rights rather than deciding the issue of horizontality wholesale gave the court flexibility to decide differently in later cases ("Horizontal Application of Fundamental Rights," 56).

[64] *State of West Bengal v. Union of India,* AIR 1963 SC 1241, 1264.

[65] Ibid.

[66] Singh, "India: Protection of Human Rights," 197. See also Anuj Bhuwania, *Courting the People* (Cambridge: Cambridge University Press, 2017). Bhuwania argues that the Supreme Court has leveraged power to become a majoritarian institution and, in fact, has a poor record when it comes to defending rights.

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v. Union of India (1982),[67] the petitioners sought to enforce existing labor laws against contractors who were paying less than minimum wage in a construction project. The petitioners argued that the state had failed to enforce these labor laws, but also that the private contractors had violated laborers' right to equality (Article 14), right to life (Article 21), and rights against exploitation (Articles 23 and 24). With respect to the right against "*begar* and other similar forms of forced labor" (Article 23), Justice Bhagwati explained that certain constitutional rights were "enforceable against the whole world."[68] Moreover, he described the right against child labor (Article 24) as "plainly and indubitably enforceable against everyone."[69] Insofar as Article 14 includes a state action requirement, Bhagwati dealt with it somewhat differently. Rather than giving Article 14's right to equality direct horizontal application, as with Articles 23 and 24 where horizontality is basically required by the text, he gave this provision *indirect* horizontal application, expanding the state's duties to ensure that private entities met minimum wage requirements.

Though limited in some ways, *People's Union* is notable for the arguments the Court made in developing horizontal application in Indian constitutional law, particularly on provisions that bear on equality. In spite of some language of state action in the Constitution, *People's Union* illustrates how "differently phrased rights may apply horizontally to a different extent and in a different manner,"[70] and particularly those rights that bear directly upon India's larger project toward equality and nondiscrimination. The concern in this case is clearly not to negotiate equality along a boundary of what is public and what is private, which is arguably how much of the state action discourse in the United States has unfolded. Rather, the Indian Court's interpretation raises the more positively constructed question of how the right to equality may charge private individuals and nonstate actors to act in certain ways. This approach, Krishnaswamy suggests, serves as a kind of model, "as it pays attention to the constitutional text, the nature of the right, and the context in which the right is claimed."[71] In this way, the Court avoids making all disputes automatically subjects of public law while carving out

[67] *People's Union for Democratic Rights v. Union of India,* 3 SCC 235 AIR 1982 SC 1473.
[68] *People's Union for Democratic Rights v. Union of India,* AIR 1982 SC 1473 (n. 35) 252–253; see also Krishnaswamy, "Horizontal Application of Fundamental Rights," 58.
[69] *People's Union for Democratic Rights v. Union of India,* AIR 1982 SC 1473 (n. 35) 250; see also Krishnaswamy, "Horizontal Application of Fundamental Rights," 59.
[70] Krishnaswamy, "Horizontal Application of Fundamental Rights," 62–63.
[71] Ibid.

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a space to understand equality as creating constitutional obligations for private citizens.[72]

The specific rationale in *People's Union* reveals what is arguably a republican understanding of the issues at hand. As Gautam Bhatia notes, beyond the fact that the workers received an amount less than the minimum wage at the time, the Court focused on the reality of exploitation and force underlying the entire situation. This was not merely a freedom to go about one's life without interference but a freedom from the power of "market forces" from which employers benefited and which they reproduced in turn.[73] Thus, Bhatia identifies a labor-republican understanding of freedom in *People's Union*, one that appreciates the arbitrary power that human-made structures and systems may impose to the benefit of some and at the expense of others.[74] This conception of freedom finds grounding in the Constitution itself, as such figures as Ambedkar took on more than a rights regime, but also confronted the belief that existing orderings were somehow neutral.[75] Instead, the Constitution embraced a "social vision" that called into question existing economic arrangements and relationships that stood to hamper the project of fraternity. In light of such a goal, attempts to dissect the meaning of the word "freedom" were less helpful than considering "what my moral obligations to you are."[76] Indeed, in this understanding, individuals and other private actors inevitably garner some obligations to one another.

The judgment in *People's Union* thus articulates both the problem of forced labor and its solution in republican terms. In contrast to the logic of state action, which does not offer conceptual space to consider the possibility of citizens' duties as such, the Court found basis for a republican logic in the constitutional history and text, not least in such aforementioned provisions as Articles 23 and 24 that imply the possibility of horizontality. The Court might have expanded the concept of state action so as to encompass nonstate actors (such as public accommodations) as a practical matter, an approach employed in both the US and Indian contexts at times. However, no concept of individual

[72] Ibid.; see also Bamforth, "The Public Law–Private Law Distinction," and Khaitan, "The Duty Bearers."
[73] Bhatia, *The Transformative Constitution,* 171.
[74] Ibid., 187.
[75] Ibid., 189.
[76] Ibid.

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constitutional duty follows from this reasoning. Instead, in *People's Union,* the Court drew from a preexisting lexicon to formulate an understanding of constitutional duty. Admittedly, this case serves as a kind of "signpost to a road not yet taken,"[77] as horizontal application remains nascent in Indian constitutionalism. Nevertheless, the sort of space that *People's Union* makes for private obligation finds its origins in the priorities of the framers, as well as the constitutional text itself. "Appealing to the framers' understandings," Justice Bhagwati explains that Article 23

> is clearly designed to protect the individual not only against the State but *also against other private citizens*. Article 23 is *not limited in its application against the State* but it prohibits "traffic in human beings and begar and other similar forms of forced labour" wherever they are found.[78]

That the framers laid the groundwork for the concept of horizontal application could thereby spare the Indian Supreme Court some of the concerns the Warren Court faced in the 1960s when it too was inclined to conceive of cases in more republican terms.[79]

The Indian Constitution's stronger foundation for horizontality in its constitutional vision comes into sharp relief in a couple of cases that have analogs in the canon of American constitutional law. Although legal scholars dispute the status of these cases from a technical standpoint as instances of horizontal application, they do reveal an underlying core that can be cast in terms of republicanism, particularly when contrasted with the analogous US cases. First, *Vishaka v. State of Rajasthan* (1997)[80] speaks to the issue of the state's duty to protect in ways not unlike the American case *DeShaney v. Winnebago County* (1989).[81] Apart from the usefulness of this case for its parallels with *DeShaney*, *Vishaka* is often considered an important case in its own right for horizontal application in India. *Vishaka* involved a social worker, employed by the State of Rajasthan, who was brutally gang-raped on the premises of her workplace after she attempted to stop a child marriage. A trial court's acquittal

[77] Ibid., 207.
[78] Singh, "India: Protection of Human Rights," 202, original emphasis.
[79] It is worth noting that the Indian Supreme Court has not, in fact, shown consistent willingness to continue in this vein. See, for example, Bhatia on *Lingegowd Detective and Security Chamber (P) Ltd. v. Mysore Kirloskar Ltd.* and *State of Karnataka v. Uma Devi* (*The Transformative Constitution,* 207–210).
[80] *Vishaka v. State of Rajasthan,* AIR 1997 SC 3011.
[81] *DeShaney v. Winnebago County*, 489 U.S. 189.

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of her attackers served as the impetus for others to file a class suit to establish laws against sexual harassment. Before *Vishaka* was decided in 1997, the only relevant provisions against such abuses were those couple of provisions of the penal code under which the social worker had sued. The petitioners argued that these did not adequately address the hazards to women in the workplace and that the issue should take on a weightier constitutional status.[82] The petitioners stated:

> The failure of the state to establish a legal framework to tackle sexual harassment in the workplace resulted in the violation of a woman's right to equality and against discrimination under Articles 14 and 15, her right to life under Article 21, and her right to "practice any profession" ... protected by Article 19(1)(g).[83]

Thus, petitioners sought to highlight the state's failure to protect rights by way of legislation and, by extension, how this failure directly resulted in the violation of women's rights by private actors.

In his careful reading of the case, Stephen Gardbaum points out that it is not entirely clear who the Court thought responsible for the harm in *Vishaka*. Indeed, given the facts of the case, the primary harm was arguably that which the assailants inflicted against the social worker.[84] But even clearer in the judgment is the interpretation that the state inflicted a harm in failing in its duty to protect citizens from such crimes and from sexual harassment in general. Though this understanding falls short of direct horizontal application, since the perpetrators are not themselves responsible for upholding rights, this latter reading is a clear instance of indirect horizontal application. Indeed, private actors were still held to the rubric of constitutional principles in the positive action the state took to regulate behavior. What previously would have been a matter of mere tort, contract, and criminal law became "a constitutional wrong" in *Vishaka*,[85] as the law was made to accord better with constitutional ends.

Recall Justice Rehnquist's general argument in the American case *DeShaney v. Winnebago County,* that the Constitution's purpose "was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political

[82] Robinson, "Expanding Judiciaries," 9.
[83] Krishnaswamy, "Horizontal Application of Fundamental Rights," 53.
[84] Gardbaum, "Horizontality in the Indian Constitution," 604–605.
[85] Krishnaswamy, "Horizontal Application of Fundamental Rights," 53–54.

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processes."[86] This reasoning and its accompanying interpretation of the founding are a far cry from either of the two suggested readings of *Vishaka*. However one reads it, *Vishaka* does entail the state's positive duty to protect individuals. Moreover, while in India and the United States the framers did look to the democratic political processes to execute such protections, it does not follow that in *Vishaka* such protections were discretionary. Indeed, the Court formulated guidelines instructing that the state should undertake such action as a *constitutional* matter. In *DeShaney*, the US Supreme Court insisted on the presence of state action to trigger constitutional rights protections, and that an inaction that led to a private harm was not adequate. In *Vishaka*, on the other hand, Chief Justice Verma does identify such a positive obligation of the state, thus "widening the scope of application of rights as the court enforces a positive obligation on the state to intervene and decisively alter the relationship between private parties."[87] Beyond the particular issues of gender equality with which this case was concerned, this reflects the more general divergence between understandings of the US and Indian constitutional projects, the latter being much more concerned with positive steps the state ought to take to remediate such abuses – historical, proximate, and the proximate rooted in the historical.

Also present in *Vishaka,* and absent from *DeShaney*, is the understanding that citizens might have duties to one another under the Constitution. While the remedy in *Vishaka* did not necessarily come by way of the constitutional duties enumerated in Article 51A, insofar as they are not justiciable,[88] the very fact that Chief Justice Verma cites them shows some continuity with the convictions aired in the Constituent Assembly debates. Krishnaswamy understands these constitutional duties as an "interpretive aid" to the Court.[89] Therefore, even if not controlling the case as a doctrinal matter, Verma's citing these duties suggests that, at

[86] *DeShaney v. Winnebago County,* 489 U.S. 189.
[87] Krishnaswamy, "Horizontal Application of Fundamental Rights," 53–54.
[88] *Surya Narain v. Union of India* (AIR 1982 Raj 1, 1981 WLN 198); see also ibid., 54.
[89] Another "interpretive aid" that Chief Justice Verma employed in *Vishaka* was the 1979 international treaty known as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Krishnaswamy, "Horizontal Application of Fundamental Rights," 55). The invocation of this agreement raises interesting questions about the role and limits of supranational and international institutions in developing horizontal rights obligations. This is a particularly salient question in light of the republican framework underlying this book and will be considered more fully in Chapter 7.

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some level, "all citizens are under the constitutional obligation not to engage in sexually discriminatory behavior in the workplace."[90] Contrast this outlook with Mary Ann Glendon's account of the United States, wherein she describes the "deafening" silence of anything like citizens' duties in national constitutional law and, in many ways, civic culture.[91]

Another US case that serves as a useful comparison to this moment in Indian constitutionalism is *United States v. Morrison* (2000). Indeed, both *Morrison* and *Vishaka* concern the introduction of legislation to deter and penalize gender-based violence and harassment. However, in passing the 1994 Violence Against Women Act (VAWA), the US Congress was not acting to fulfill any constitutional duty to protect. Indeed, in Rehnquist's opinion in *Morrison*, the Supreme Court decided that the Commerce Clause and Equal Protection Clause did *not* empower Congress to enact certain sections of the law. Respecting the Commerce Clause, the Court argued that punishing gender-based crimes, as VAWA proposed to do, was beyond the purview of the national government and ought to be left to the states. Moreover, the Court argued that the legislature could not rely on the Equal Protection Clause in regulating private relationships. Citing the *Civil Rights Cases* as precedent, the Court maintained that the state action doctrine did not permit bringing constitutional commitments to bear on private actors. Neither did the state action doctrine empower the national government to hold accountable state actors, such as the state legislatures, for their *inaction* to legislate against gender-based crimes.

The decision in *Morrison* illustrates plainly the contention that the US Congress did not have the same constitutional duty to protect, and indeed could not assume such a duty, as did the Indian Parliament. One could argue that the role of federalism in American constitutionalism makes sense of the outcome in *Morrison*. Even though India is also a federal country, the arc of its constitutional jurisprudence places much less emphasis on the unique governing power of its states, perhaps symptomatic of differences in its larger constitutional vision.[92] Nick

[90] Krishnaswamy, "Horizontal Application of Fundamental Rights," 54.

[91] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), 77.

[92] Granville Austin explains that, from the adoption of the Constitution, India did not have a robust understanding of citizenship at the state level (*Working a Democratic Constitution*). On the other hand, Vinay Sitapati explains that different states have different understandings of "other backward classes" ("Reservations," in *The Oxford Handbook of the Indian Constitution*, 722).

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Robinson explains, "In contrast to the American Constitution, which largely solidified the economic and social status quo even while bringing momentous political changes, India's Constitution was born with an eye towards multiple transformations."[93] Moreover, as the 1994 *Bommai* decision discussed later reveals, such a transformative project on the national scale does not easily allow for significant deference to subnational units. However, separately from the federalism question, the general absence of anything like a duty to protect in the United States is worth noting. The American states could regulate gender-based violence as they wished, but they also could do nothing and face no repercussions, even as state actors. Thus, while the variable of federalism certainly influences constitutional argumentation and the larger story in the United States, the difference between *Morrison* and *Vishaka* also points toward a more basic difference that finds expression in Glendon's insight about the dearth of "duties talk" in the United States. Whereas the Indian Supreme Court in *Vishaka* mandated government action as a constitutional matter, the US Supreme Court rejected Congress's initiative as a constitutional matter.

Another case, which has an American analog in the decision of *Shelley v. Kramer*, may seem to undercut this chapter's argument at first blush. In 2005, the Indian Supreme Court decided *Zoroastrian Cooperative Housing Society v. District Registrar*.[94] This case involved a society that restricted membership only to Parsis. Since housing could only be transferred to members, the practical effect of the agreement was that only Parsis were permitted to buy houses in the cooperative society. Both cases thus involved housing restrictions on the basis of classifications that had particular political salience in their respective contexts – race in *Shelley*, and religion in *Zoroastrian Cooperative*. To this extent, comparing these cases offers a glimpse into how each polity has addressed fundamental questions of equality among citizens in the common area of housing.

Recall that the US Supreme Court decided *Shelley* based on the fact that the Court was an arm of the state and would have been implicated in discrimination contra the Fourteenth Amendment if it were to uphold the restrictive housing covenant. While the decision in *Shelley* technically toes the state action line and distinguishes between public and private spheres, the result clearly approaches and, according to some typologies, even represents a form of horizontal application. Indeed, the case is

[93] Robinson, "Expanding Judiciaries," 2–3.
[94] *Zoroastrian Cooperative Housing Society v. District Registrar* (2005) 5 SCC 632.

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rightly understood as an anomaly in the long history of state action in the United States. And yet, the Court's conforming to the doctrine of state action still serves to turn attention away from the actual issue of the case, which was a private harm.

Perhaps surprisingly, the decision in *Zoroastrian Cooperative* more closely conforms to a strict state action line, at least in the particular outcome the Indian Supreme Court reaches. Rather than relying on the fact that the Court would in effect be upholding the restrictive housing covenant in deciding in favor of the cooperative society, the Court seems to engage the validity of the cooperative society's agreement itself. While the cooperative society argued its case on the basis of its right to association (Article 19(1)(c)) and minorities' right to cultural preservation (Article 29 (1)), the respondents argued that the restrictive covenant violated public policy, specifically Article 15 of the Constitution that prohibits discrimination in both public and private spaces. Thus, the arguments from both sides invited the kind of substantive analysis the US Supreme Court had avoided in *Shelley*. Although the Court ruled in favor of the cooperative society, however, it is unclear whether they based their decision on the constitutional rights to association and cultural preservation.

Legal scholars have acknowledged that the reasoning in *Zoroastrian Cooperative* is "obtuse,"[95] making it difficult to contend with and nearly impossible to come to any definitive conclusion about the controlling rationale.[96] For these reasons, as well as the potentially important fact that this case was decided only by a two-judge panel,[97] the present

[95] Gautam Bhatia, "Exclusionary Covenants and the Constitution – II: The Zoroastrian Co-op Case," *Indian Constitutional Law and Philosophy*, January 12, 2014, accessed January 25, 2019, https://indconlawphil.wordpress.com/2014/01/12/exclusionary-covenants-and-the-constitution-ii-the-zoroastrian-co-op-case, 2.

[96] Assessing the extent to which this particular case will serve as precedent in future similar cases requires acknowledging other contextual factors as well. For example, the Parsis are a minority religion in India and one that the public tends to view favorably. Moreover, the case of the housing cooperative was argued by a prominent Parsi lawyer who became the attorney general of India. (I am indebted to Tarunabh Khaitan for these insights.) Given these forces working in favor of the cooperative, it is not necessarily clear that the outcome of this case would be replicated under different circumstances. On the other hand, this fact is not so important to the present project as this book is concerned more with theoretic potential in constitutional arguments than with constitutional development per se.

[97] Article 145(3) of the Constitution of India suggests that cases decided by five or more judges are more authoritative than those decided by panels of only two or three. See also Andrew Green and Albert H. Yoon, "Triaging the Law: Developing the Common Law on the Supreme Court of India," *Journal of Empirical Legal Studies* 14:4 (2017), 706–710;

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account of the case is necessarily tentative. There seem to be two lines of reasoning in *Zoroastrian Cooperative*. On the one hand, although the cooperative society's bylaw preventing the sale of land to non-Parsis had to conform with "public policy," the Court argued that conformity with relevant statutory law, namely the Gujarat Cooperative Societies Act,[98] rather than directly with the Constitution was sufficient. It states:

> So long as there is no legislative intervention of that nature [to eliminate a qualification for membership in the cooperative society based on sex or religion], it is not open to the court to coin a theory that a particular by-law is not desirable and would be opposed to public policy as indicated by the Constitution.[99]

Thus, the Court's argument amounts to a fairly robust state action requirement, insofar as it maintains some separation between parliament's ability to legislate private interchange and the Constitution. On this reading, parliament has wide discretion in setting the parameters of such societies without running the risk of implicating the state in any discrimination in which the society chooses to participate.[100] Indeed, it may legislate so as to permit such restrictive covenants among religious groups such as the Parsis in spite of the constitutional project to render such categories "legally irrelevant."[101] Put differently, private agreements such as the one among the Parsis of this housing cooperative were subject

Tarunabh Khaitan, "Equality: Legislative Review under Article 14," in *The Oxford Handbook of the Indian Constitution*; Gardbaum, "Horizontality in the Indian Constitution," 613.

[98] Bhatia, "Exclusionary Covenants and the Constitution – II: The Zoroastrian Co-op Case," 2.

[99] *Zoroastrian Cooperative Housing Society*, (2005) 5 SCC 632; see also Gardbaum, "Horizontality in the Indian Constitution," 611.

[100] Bhatia shows that this may have been inconsistent with prior judgments, however. He quotes the Court in *Delhi Transport Corporation v. DTC Mazdoor Congress:* "[I]n the absence of specific head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest . . . declare such practice or rules that are derogatory to the constitution to be opposed to public policy" (Bhatia, "Exclusionary Covenants and the Constitution – II: The Zoroastrian Co-op Case," 2). On this general point, Gardbaum suggests the greater discretion of the court may hinge on whether the legislation in question concerns a mandatory law, "in that the State is prescribing the compulsory terms of private legal relationships," or permissive law, in which "individuals set the terms of their private legal relationships and the State enforces them whatever they are" ("Horizontality in the Indian Constitution," 612).

[101] Bhatia, *The Transformative Constitution*, 122.

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only to such regulatory legislation, and not necessarily the Constitution itself.[102]

Zoroastrian Cooperative thus seems to involve a similar reasoning as in *Shelley*, only reaching the opposite outcome, and even going further in that the state ultimately did uphold the covenant in question. Despite constitutional ends, such as rooting out discrimination and fostering equality, that might hold up public principles as a standard even for private projects, this episode (or at least this first reading of it) signals a kind of retreat to conventional understandings of rights contra the Constitution's transformative streak. The Court sidesteps both those constitutional provisions that would assign private actors some role in upholding constitutional commitments and those that call upon the legislature to make law in accord with the Constitution. Instead, the Court seems to carve out anew a space in which private actors may enter into contracts unencumbered by constitutional ends.[103]

An alternative reading of *Zoroastrian Cooperative* that is plausible, albeit underdeveloped in the Court's judgment, is that the Court did engage in constitutional balancing here, and that "its narrow conception of public policy was the *conclusion* and not the premise of its analysis."[104] In other words, the Court did question and ascertain that the cooperative society's particular bylaw conformed to the Constitution, and therefore proceeded on this basis to balance the rights to freedom of association and cultural preservation against the right to be free from discrimination. Indeed, there is some evidence for this in the judgment. The Court states:

> [I]t is open to that community to try to preserve its culture and way of life and in that process, to work for the advancement of members of that community by enabling them to acquire membership in a society and allotments of lands or buildings in one's capacity as a member of that society, to preserve its object of advancement of the community.[105]

[102] As Bhatia points out, the court does not seem to account for the fact that the Indian Contract Act does permit the invalidation of contracts and even exception to the enforcement of statutes that run up against public policy (*The Transformative Constitution*, 123).

[103] The stakes of this question come into sharper relief when we consider the perennial issue of housing discrimination in India. Indeed, discrimination on the basis of religion continues to be a problem in the rental and housing markets of many Indian metropolises (remote interview with Gautam Bhatia, March 24, 2021).

[104] Gardbaum, "Horizontality in the Indian Constitution," 612.

[105] *Zoroastrian Cooperative Housing Society*, (2005) 5 SCC 632, para. 33; see also Bhatia, "Exclusionary Covenants and the Constitution – II: The Zoroastrian Co-op Case," 4.

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This discussion about preserving one's "culture and way of life" suggests that rights such as those found in Articles 19 and 29 did factor into the Court's judgment, and that the decision in *Zoroastrian Cooperative* did not hinge simply on the right of private actors to enter any manner of contract under statutory law. Rather than base its decision primarily on a state action requirement, the Court did apply these rights horizontally, in this reading. It simply came down in favor of the rights to association and cultural preservation, in this instance, rather than antidiscrimination. Apart from the fact that the Court seems to refer to these competing constitutional rights, this reading is further corroborated by the fact that contractual rights are, historically, not so prioritized as rights of association in Indian constitutionalism.[106] Moreover, which reading is "correct" may matter more for developmental stories than it does for the current theoretical project. That the latter reading of *Zoroastrian Cooperative* is even plausible demonstrates the theoretical potential for a republican interpretation of horizontality in Indian constitutional discourses.

If there is any merit to this second reading, then this case does involve horizontal application to a greater degree than does *Shelley*. Indeed, in this latter reading, *Zoroastrian Cooperative* actually takes up the constitutional substance of the question at stake rather than rely on the fact of judicial enforcement of contracts. One might question, then, how this decision that seemingly favors discrimination comports with the larger purpose of the Indian Constitution. Is not the Indian project founded on the goal of equality and fraternity among all constituent religions, ethnicities, and cultures? The key here may be the fact that the Parsis are a minority population in India. In a similar way, the American case *Wisconsin v. Yoder* allowed Amish communities to make alternative educational choices for their children, thus acknowledging a need to accommodate differences of particular populations, even as they may sit in some tension with other constitutional commitments. Indeed, such efforts toward accommodation are rooted in other constitutional commitments such as cultural preservation. This is not to say that rights of

[106] Bhatia, "Exclusionary Covenants and the Constitution – III: Zoroastrian Cooperative and Political Liberalism," *Indian Constitutional Law and Philosophy*, January 13, 2014, accessed January 25, 2019, https://indconlawphil.wordpress.com/2014/01/13/exclusionary-covenants-and-the-constitution-iii-zoroastrian-cooperative-and-political-liberalism. Bhatia points out that this has been the case since the debates of the Constituent Assembly.

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association and cultural preservation would always trump rights of nondiscrimination. It is unlikely, for example, that such majority populations as adherents to the Hindu faith would have succeeded with the same arguments, since Article 29 of the Constitution refers specifically to minorities' rights to cultural preservation. As Bhatia argues, the Indian Constitution actually "contains the tools to go one step beyond the solutions advanced in other jurisdictions" when it comes to horizontal discrimination, including restrictive covenants. Indeed, with such provisions as Article 15(2), it may bring the principles of equality and nondiscrimination to bear directly on private actors engaging in a wide range of transactions, whenever constitutional actors are inclined to do so.[107]

Although one cannot easily sum up the *Zoroastrian Cooperative* case, one also cannot ignore it when considering the question of horizontal application in India, particularly given the case's implications for the larger constitutional objects of equality and nondiscrimination. There are good reasons to adopt different readings of the case and to believe that the case's outcome is circumscribed to the unique set of facts before the Court.[108] While one might be justified to draw conclusions about this case only hesitantly, the later case *Indian Medical Association v. Union of India* (*IMA*) sheds additional light on the arguments in *Zoroastrian Cooperative*. Whereas *Shelley* is a high-water mark for horizontality in the United States, *Zoroastrian Cooperative* seems to be only one episode in what could be an ongoing thread, pending Court members' understanding of the Constitution's ends and, consequently, their receptivity to the republican elements of horizontality. And indeed, in the *IMA* case that followed a few years later, we see a convergence of discourses concerning the different commitments of Indian

[107] Bhatia, *The Transformative Constitution*, 128–131, grounds this argument in the court's capacious reading of Article 15(2)'s term "shops" in *Indian Medical Association v. Union of India* (2011) 7 SCC 179, paras. 112–113. In turn, the court's interpretation grows directly out of the constitutional debates.

[108] Bhatia, "Exclusionary Covenants and the Constitution – IV: Article 15(2), *IMA v. UoI*, and the Constitutional Case against Racially/Religiously Restrictive Covenants," *Indian Constitutional Law and Philosophy*, January 14, 2014, accessed January 25, 2019, https://indconlawphil.wordpress.com/2014/01/14/exclusionary-covenants-and-the-constitution-iv-article-152-ima-v-uoi-and-the-constitutional-case-against-raciallyreligiously-restrictive-covenants, 1. Bhatia explains that "the correctness of Zoroastrian Cooperative rests upon Article 19(1)(c) [freedom of association] read with Article 29 [rights of groups to preserve their culture], and is therefore grounded in its own set of specific facts. It does not serve as precedent for the legality and enforceability of restrictive covenants qua contracts, more generally."

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constitutionalism – specifically, to the rights enumerated in Part III and the more compensatory scheme of social justice in Part IV. In this later case, the deciding members of the Supreme Court showed themselves willing to engage all parts of the constitutional project. Moreover, in this case the Court employed horizontal application and did so through a republican manner of argument.

Emerging Duties under the Transformative Constitution

A few antecedent battles in Indian constitutional history laid crucial groundwork for the *IMA* case and expansion of horizontal application. In its early years, the Indian Supreme Court's judgments showed a kind of "static" interpretation of the Constitution.[109] This manifested in its drawn-out battle with parliament, including such episodes as the passing of the First Amendment and the *Kesavananda* case. Moreover, this static interpretation manifested in the Court's early horizontal application decisions, which adhered to a state action requirement with respect to Part III of the Constitution. As Jacobsohn and Roznai explain, "[T]he Court became the perfect embodiment of the disharmonies within the Constitution, as it found itself over time on both sides of the tension inherent in the dual commitment to socio-economic transformation and liberal democratic rights."[110] Such cases as *People's Union* after the Emergency Era and, later on, *Vishaka* show some shift in the discourse on the reach of Part III rights. While *Zoroastrian Cooperative* displays adherence to a strict state action rationale, the obscure nature of this decision could be interpreted as additional evidence of a break from prior understandings, at least among some constitutional actors. In contrast with what some readings of *Zoroastrian Cooperative* might by themselves suggest, later cases reveal some willingness to develop horizontal application further. In particular, the Court has incorporated Part IV of the Constitution, containing the Directive Principles, into its own constitutional purview, a development which certainly bears on the way actors discuss the horizontal application of rights to private actors.

In 1994, the Court decided *S. R. Bommai v. Union of India*, what has been described as the "linchpin in Nehru's step-by-step progression."[111] The case arose amid ongoing violence between Hindus and Muslims

[109] Jacobsohn and Roznai, *Constitutional Revolution,* 145.
[110] Ibid., 157.
[111] Ibid., 166.

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following the destruction of a mosque in Ayodhya in the State of Uttar Pradesh. The party in power in the state, the Hindu nationalist BJP, was clearly complicit in its negligence to quell the violence. And so, pursuant to Article 356 of the Constitution, the president of India assumed rule over the state. When the state challenged this action, the Supreme Court explained that, in its failure to take steps to put down the violence, the BJP-led government demonstrated that it "could not be trusted to follow the objective of secularism which was part of the basic structure of the Constitution and also the soul of the Constitution."[112] Furthermore, since the Constitution "does not provide for its own demise,"[113] the president's actions were justified as necessary to save the basic structure of the Constitution, including such fundamental principles as secularism as an instrument of equality and the larger catalog of Directive Principles in Part IV.

In *Bommai,* the Court extended the Basic Structure Doctrine of *Kesavananda* beyond constitutional amendments to bear on the actions political actors pursue in the course of ordinary politics. Put differently, apart from the electoral repercussions politicians risk in ignoring the Directive Principles, the decision in *Bommai* established that "a Government will also have to answer for ignoring the Directive Principles of State Policy in a court of law."[114] In this way, the Court embraced within its purview the same Directive Principles previously considered unenforceable, realizing a conviction that motivated many in the Constituent Assembly, namely, that the soul of the Constitution included both Part III and Part IV.[115] *Bommai* thus marks an important moment in the larger constitutional revolution of which Nehru spoke, and a significant point of distinction from the US *DeShaney* case. Specifically, it rendered state *in*action respecting the Directive Principles constitutionally liable and subject to the judgment of the Supreme Court. Moreover, *Bommai* set the stage for applications of horizontality that also incorporated the Directive Principles, as became evident in the *IMA* case.

In *IMA*,[116] the Supreme Court applied *Bommai* to the effect of embracing a transformative constitutional understanding, specifically

[112] *S. R. Bommai v. Union of India*, at 143.
[113] Ibid., at 237.
[114] Jacobsohn and Roznai, *Constitutional Revolution,* 170–171.
[115] Ibid., 158; see also *Minerva Mills v. Union of India*; Shruti Rajagopalan, "Constitutional Change: A Public Choice Analysis," in *The Oxford Handbook of the Indian Constitution*, 138.
[116] *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179; see also Raj, "Private Discrimination," 26–30.

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understanding duties of private actors as emerging not only from some of the rights enumerated in Part III but also potentially from the Directive Principles of Part IV. In short, the Court in *IMA* brought the Basic Structure Doctrine to bear on parliament's efforts to effectuate the Directive Principles by way of constitutional amendment. In addition to the usual issues surrounding the enforceability of social policy and the practice of reservations in particular, however, the Court faced the additional question of how such initiatives applied horizontally. Specifically, it considered the validity of the Ninety-Third Amendment to the Constitution, adopted in 2005, that laid groundwork for legislatures to extend to private actors the charge to maintain reservations in education – essentially guaranteeing a requisite level of representation across spheres of life for members of castes and other groups that had faced systematic disadvantage in Indian society. The Amendment added a fifth section to Article 15 of the Constitution that read:

> Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions *including private educational institutions, whether aided or unaided by the State,* other than the minority educational institutions referred to in clause (1) of article 30.[117]

Similar to the First Amendment discussed above, this Ninety-Third Amendment aimed to ensure that Article 15's guarantee of formal equality would not be deployed against efforts to realize a more substantive equality. However, that this Amendment applied to *both* public and private educational institutions made it importantly different from prior constitutional developments. Indeed, this Amendment directed the momentum of more capacious understandings of the constitutional project toward private spaces, specifically private educational institutions. Whereas the division between Part III and Part IV of the Constitution (as well as other divisions, as between Article 15(1) and Article 15(2)) had provided grounds on which to circumscribe an already limited conception of horizontal application, the Ninety-Third Amendment began to break down some of these divisions, acknowledging that some constitutional ends would implicate private actors.

[117] Constitution of India, Article 15, Section 5, emphasis added. Again see Siegel, "Equality Talk," for a discussion on similar issues in the United States.

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Pursuant to this new amendment, the Delhi Act of 2007 prohibited certain educational fees and mandated that a number of seats in all educational institutions be reserved for "Scheduled Castes, Scheduled Tribes and other socially and economically backward classes."[118] In the very next year, a private, unaided professional school in Delhi, called the Army College of Medical Sciences, was founded, admitting to their student body only "wards, or children of current and former army personnel and widows of army personnel, who, the school's defenders claimed, had experienced educational disadvantages relative to the civilian population."[119] The school ranked applicants according to their test scores, but made no distinction on the basis of social, economic, or cultural background, other than meeting the army personnel requirement. Therefore, while the population the school aimed to serve might have faced disadvantages of their own, the school's admission policy did not necessarily benefit those populations belonging to the castes and backward groups the Delhi Act and, by extension, the Ninety-Third Amendment aimed to protect. The appellant argued that the law and amendment were both contrary to the basic structure of the Constitution insofar as they constituted "unreasonable restrictions" under Article 19 (detailing the "Right to Freedom") and were likely to destroy the freedom to maintain such unaided nonminority educational institutions.[120]

In prior years, the Court might have invoked the Basic Structure Doctrine of *Kesavananda* to uphold a more limited or "static" equality that favored the Army College of Medical Sciences' case. Instead, however, the Court followed *Bommai* in that it acknowledged parliament's efforts to implement the Directive Principles and thereby secure a more substantive equality as part and parcel of the larger constitutional project. In this understanding, the Ninety-Third Amendment did not betray the Basic Structure Doctrine, but rather moved the country forward in a protracted constitutional revolution. Moreover, the particular fact that the Amendment and subsequent law included such private institutions as the Army College of Medical Sciences in its efforts to achieve greater

[118] Jacobsohn and Roznai, *Constitutional Revolution,* 176fn107.

[119] Ibid., 184.

[120] *Indian Medical Assn. v. Union of India,* (2011) 7 SCC 179, para. 70. While proponents of horizontality should welcome the expansion of horizontality that *Indian Medical Association* constitutes, the facts of this case are such that they might incline even proponents to seek out bounds around this constitutional practice. Specifically, the case's outcome precludes private actors from prioritizing disadvantaged groups that are not among those explicitly delineated by the constitutional project.

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equality did not detract from the constitutional vision. Rather, this effort to reach into private spaces was in line with the vision many in the Constituent Assembly articulated – to bring private actors into the fold of the constitutional project and inculcate a conception of fraternity among citizens. Insofar as abuse occurred and inequality existed without distinction between public and private spaces, so too must the Constitution ultimately reach these spaces. The Court seems to adopt this position for itself in the *IMA* case, directly speaking to the relationship between constitutional ends and duties of citizens. It states, "[T]he same concerns of national purpose, goal and objectives that inform the constitutional identity [do not] miraculously disappear in the context of the private sector."[121]

Furthermore, the Amendment in question not only was consistent with the Constitution, in the Court's telling, but actually augmented the fundamental constitutional project that had long aimed at transforming the private sphere to effect equality and even fraternity among citizens. Even apart from the new Clause 5 the Ninety-Third Amendment added to Article 15, the Court briefly acknowledged how the preexistent Clause 2 in Article 15 also serves to ground the Delhi Act of 2007.[122] While, prima facie, this provision simply provides recourse for discrimination in "access to shops, public restaurants, hotels and places of public entertainment," the Court finds in Article 15(2) nothing less than the Constitution's "conception of social justice," a conception meant to apply more extensively than standard definitions of "shops" might suggest.[123] Indeed, the Court maintained, one must read this provision in the context of the polity's "national aspirations of establishing a society in which Equality of status and opportunity, and Justice, social, economic and political." Understood through this lens, private establishments must "not contribute to the perpetration of unwarranted social disadvantages associated with the functioning of the social, cultural and economic order."[124] The Army College of Medical Sciences was perpetuating such disadvantages by not considering the disparate impact their admission standards had on different populations, thereby hampering the Constitution's end of substantive equality.[125]

[121] *Indian Medical Assn. v. Union of India,* (2011) 7 SCC 179, para. 108.
[122] Ibid., paras. 112–114.
[123] Ibid., para. 112; see also Bhatia, *The Transformative Constitution*, 131–139.
[124] *Indian Medical Assn. v. Union of India,* (2011) 7 SCC 179, para. 113.
[125] Ibid., para. 114.

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This effort to bring equality into private spaces took many forms over the years, involving different rights from Part III and, as in *IMA,* different Directive Principles from Part IV. Moreover, that the question of horizontal application occurred in the specific area of education was not particularly surprising. Insofar as many Indian schools are privately run, bringing education into line with constitutional ends could not but raise the question of horizontal application. Education was a natural sector in which to give effect to constitutional commitments, as education influences so much of the life and future of a polity, as well as how citizens relate to one another and relate to the Constitution. The upshot of such regulation was that schools, including private schools, faced a real call to action when the Delhi Act required the implementation of reservations. This application of horizontality was never going to be instantaneous or effortless. Indeed, these regulations entailed a fundamental shift in the mission of the Army College of Medical Sciences as initially conceived. But then, the Indian Constitution was never going to be an instantaneous or effortless project. As Jacobsohn and Roznai explain, "Since the greatest potential societal effect of group-based admissions policies implicates the private domain, it is only appropriate that a case confronting that issue directly became the occasion for instructive reflection on India's constitutional revolution."[126] Thus, more than any of the preceding decisions that implicated the question of horizontal application, the *IMA* case shows a clear shift from rights-centric understandings to republicanesque discourses concerning constitutional ends and how those ends involve the cooperation of private actors.

The Future of Horizontal Application?

Observers of Indian constitutional politics may find a worksite for the continued development of horizontal rights in questions of religion – an ongoing issue that strikes at the heart of India's constitutional project. Scholars have described religion in India as "thick" insofar as it occupies a central role in public life in comparison to many other countries today.[127] Many religious practices also stand at odds with constitutional commitments to equality, propagating systems of caste and gender discrimination, for example. Thus, insofar as it adopts a transformative

[126] Jacobsohn and Roznai, *Constitutional Revolution,* 175.

[127] Bhatia, *The Transformative Constitution*; Gary Jacobsohn, *The Wheel of Law* (Princeton: Princeton University Press, 2009).

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vision, the Indian Constitution could not avoid confrontation with religion.[128] The practical complexity of such reform is clear, as religion is deeply constitutive of many diverse people's lives and even daily habits.[129] Additionally, a kind of theoretical complexity accompanies these issues. In any context, religion serves to introduce an alternate and independent set of standards – one might even say an alternate set of laws – to the conversation.[130] Thus, whereas questions of horizontality always involve balancing, the particular issue of religion raises unique challenges as religious communities within a polity maintain potentially different understandings of, say, the common good. One necessarily confronts the question of whether and how religious groups should be treated like other nonstate actors such as businesses or private employers. While all countries confront such questions in some form, they become more salient in contexts like India, where religion plays a thick role in daily life and constitutional understandings assume ameliorative or transformative ends.[131]

The question of the relationship between religion and politics is as old as both religion and politics. However, to adapt the question to the terms of this book, we might ask how horizontality's function to apply public norms across the polity comprehends the existing norms of religion. To the extent one understands liberalism as requiring a kind of sequestration of religion to a separate private sphere, both for its own sake and for the sake of civil peace, this issue might serve to reveal the reach and usefulness of this book's republican framework. In short, while a constitution inspired by conventional liberal accounts would likely preserve wider latitude for religious practices, a constitution assuming the republican elements that this book identifies with horizontality may be more inclined to take on the moral question of balancing religious and civil

[128] Jacobsohn, *The Wheel of Law*.

[129] See Gary Jacobsohn's analysis of the Directive Principles and the Uniform Civil Code in "India: The Ameliorative Aspiration," in *The Wheel of Law*, 91–124.

[130] See Ran Hirschl's discussion of these issues in *Comparative Matters* (Oxford: Oxford University Press, 2014).

[131] This is in contrast with such countries as the United States where religion is generally "thinner." On Jacobsohn's telling, "[T]he greatest assurance that the protection of diversity for all *religious* beliefs will be taken seriously – including those beliefs that violate the spirit of the "self-evident' principles underlying the constitutional agreement – lies in the achievement of *political* assimilation" (*The Wheel of Law*, 58–59).

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norms against one another. More specific to the Indian context, the Constitution guarantees both freedom of conscience (Article 25) and group rights that allow a religious denomination to "manage its own affairs in matters of religion" (Article 26).[132] At the same time, both Articles 25 and 26 include limitation clauses that admit of some state regulation of religious practices. Unsurprisingly, these dual commitments have come into conflict time and again. The question, for Indian constitutional actors, is how to adjudicate these sometimes-diverging commitments.

These musings necessarily raise the question of horizontal application and, more specifically, the obligations of religious denominations vis-à-vis constitutional commitments to equality and antidiscrimination. The question comes into sharp relief in the 2018 case *Indian Young Lawyers' Association v. State of Kerala*, often called the *Sabarimala* case, considering whether overseers of the Sabarimala Temple should be made to admit women in spite of the long practice of barring women between the ages of ten and fifty. Indeed, the controversy goes back decades and has continued to be disputed even after the 2018 judgment.[133] The Supreme Court's current habit in such cases is to weigh whether the practice in question constitutes an "essential religious practice."[134] If the Court deems something "essential," then that practice remains protected from regulation under Articles 25 and 26. If not, then that religious denomination incurs duties to adjust their practices to align better with, say, the constitutional principle of equality. And indeed, the Court decided in the *Sabarimala* case that restrictions to temple entry were not essential to Hinduism and, on this basis, regulable.

In some ways, the essential religious practices test seems deferential toward religion, permitting those practices that run up against

[132] Interestingly, the Indian ambassador to South Africa advised parties in the South African constitutional negotiations in 1993 to include a commission on considering the protection of minority groups in their constitution insofar as South Africa was contending with similar diversity. Ultimately, after extensive debates, the Constitutional Assembly opted only to include individual rights rather than group rights in the Final Constitution. However, Chapter 9, Section 185 of the Final Constitution does establish the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities (remote interview with Sheila Camerer, March 3, 2021; remote interview with Nicholas Haysom, October 26, 2020).

[133] "Congress Proposes Law to Bar Entry of All Women to Sabarimala Shrine," *The Federal*, February 7, 2021, accessed April 25, 2021, https://thefederal.com/states/south/kerala/congress-proposes-law-to-bar-entry-of-all-women-to-sabarimala-shrine.

[134] Bhatia, *The Transformative Constitution*, 146–155.

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constitutional commitments if they are *essential*.[135] As with any issue raising the question of horizontality, however, religious authorities may still be called to support such public projects as promoting equality, as we saw in the *Sabarimala* case. The essential religious practices test poses unique challenges, moreover, in that it entangles the Court in "knotty questions of religious and theological doctrine."[136] Indeed, some criticize the merits of this doctrinal test on the very basis that it charges the state with evaluating and defining the content of religion.[137] Gautam Bhatia, for example, proposes an antiexclusion principle to decide such cases, calling on the Court instead to determine how religious practices bear on secular ends, rather than try to discern the essential practices that should be a matter internal to a given religion.

In addition to being grounded in text and history, an antiexclusion principle avoids the difficulty of a court attempting to discern a religion's essential practices. Instead, this principle operates on a basis that the Constitution itself adopts and cognizes. Arguably, in this understanding a republican logic is more pronounced, as nonstate actors are held to account for the constitutional project regardless of how it might bear on their religion. Put differently, the antiexclusion principle explicitly operates from the perspective of the state, whereas the essential practices test at least presumes to operate from the perspective of the religion in question, in spite of the aforementioned difficulties of this approach. While the antiexclusion principle is more upfront in its prioritization of constitutional principles, this posture may well be constitutive of any project understood as transformational. In a similar vein, Bhatia explains:

> [T]he constitutional text itself exhibits reformist intentions; and scholars of Indian secularism have repeatedly differentiated it from its liberal

[135] Along similar lines, Chiara Cordelli argues that a "right to democracy" ought to be enforced even within "large and hierarchical churches," and that "this right is not overruled by claims to freedom of religious association and church autonomy." Interestingly, Cordelli's account hinges on an ability to distinguish between essential and nonessential beliefs or practices, imposing democratic norms only on the nonessential in order to preserve some autonomy of religious organizations. In other words, she wants to "democratize organized religion, but stops short of imposing substantive egalitarian norms on churches" (Cordelli, "Democratizing Organized Religion," *Journal of Politics* 79:2 (2017), 587).

[136] Bhatia, *The Transformative Constitution*, 167.

[137] In some ways this may invite comparison with a kind of Rousseauian account of civil religion (*The Social Contract, Book IV*, chap. 8).

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> Western counterpart, noting its "ameliorative" or "contextual" nature, which specifically envisages State intervention into religion in order to achieve certain substantive values.[138]

While a transformative project is likely to call for a prioritization of public values in most any context, this seems especially true in a country like India where the project itself has been defined in terms of reshaping deeply rooted religious practices. Put differently, such a transformative project as found in India, by definition, prioritizes the ultimate realization of constitutional ends over certain religious practices.

Cecile Laborde argues in favor of treating religion differently from how "separationist" models, such as the essential religious practices test, propose. Specifically, she argues for a "minimal secularism," maintaining that religion ought not to be singled out for special treatment when it clashes with public projects, particularly "liberal democratic ideals."[139] Rather, in her telling, religion should be subject to regulation in much the same way as any other area of life. Evidence of such alternative approaches seems to be present in both India's constitutional text and history. In fact, a couple of justices have hit upon a similar approach in their judgments – specifically, Chief Justice Sinha in his dissent from the 1962 case *Saifuddin v. State of Bombay*, and Justice Chandrachud in his concurrence to the *Sabarimala* judgment. Both judges focus on the impact of each respective case on the public project of antiexclusion, as Bhatia and Laborde advocate, rather than have their argument hinge on any elaboration of religious doctrine.[140]

Another emergent issue that potentially triggers horizontal application is the rights of same-sex couples. In 2009, the Delhi High Court decided *Naz Foundation v. Union of India*, overturning a colonial-era provision in the penal code that criminalized homosexual activity on the basis of Article 14 (Equality Before Law), Article 15 (Prohibition of Discrimination), and Article 21 (Protection of Life and Personal Liberty).[141] Soon after the case was decided, Tarunabh Khaitan described

[138] Bhatia, *The Transformative Constitution,* 154.

[139] Cécile Laborde, "Minimal Secularism: Lessons for, and from, India," *American Political Science Review* 115:1 (2021), 3.

[140] Bhatia, *The Transformative Constitution,* 166–168.

[141] In its decision, the Delhi High Court goes out of its way to treat discrimination on the basis of sexual orientation in private spaces. See para. 104: "Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the

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the judgment as a natural conclusion given the principles of the Indian Constitution. He states, "Given the liberal, secular and egalitarian Constitution of India, it is the opposite result that would have surprised constitutional lawyers."[142] And yet, that is exactly what the Supreme Court did four years later. In *Koushal v. Naz Foundation,* the Supreme Court overturned the Delhi High Court's 2009 decision and, with it, what Khaitan had described as a "new deal for all minorities."[143] The Court cited in its reasoning the "principle of presumption of constitutionality" of legislation and the need to ground important decisions in the principles of the Indian polity rather than of foreign jurisdictions (as the Delhi Court had).[144] Finally, in the back-and-forth fashion that, Jacobsohn and Roznai argue, defines the arc of India's constitutional history, the Supreme Court revisited the issue in 2018, this time ruling in favor of decriminalization. The Court stated:

> [T]he Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement . . . The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.[145]

In this way, the Court ultimately argued in its unanimous decision that "the constitutional morality" required this new application of the equality principle in India.[146]

Insofar as the decriminalization of homosexual activity involved questions about the penal code, this particular sequence of cases implicated

horizontal application of the right enshrined under Article 15." See also Tarunabh Khaitan, "Reading *Swaraj* into Article 15: A New Deal for All Minorities," *NUJS Law Review* 2:3 (2009), 427–429.

142 Khaitan, "Reading *Swaraj* into Article 15," 420.

143 Ibid., *Suresh Kumar Koushal & Anr v. Naz Foundation & Ors*, AIR 2014 SC 563.

144 Jacobsohn and Roznai, *Constitutional Revolution,* 262.

145 *Navtej Singh Johar and Others v. Union of India,* AIR 2018 SC 4321, para. 80; see also ibid., 266.

146 Some maintain that strategic motives also underlie this judgment. Specifically, outgoing Chief Justice Deepak Misra desired to leave his post on a high note after facing criticism for being progovernment. This case proved to be an easy win insofar as activists had already done much to change public perception with respect to gay rights, and the government at this point did not seek to defend the penal code. Indeed, the court would have been unlikely to decide the case differently (remote interview with Gautam Bhatia, March 24, 2021).

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only the state and state action. Nonetheless, the Court seized upon the opportunity in its 2018 decision to lay groundwork to extend rights obligations further. It stated:

> It is not only the duty of the State and the Judiciary to protect this basic right to dignity, but *the collective at large also owes a responsibility to respect one another's dignity*, for showing respect for the dignity of another is a constitutional duty. It is an expression of the component of *constitutional fraternity*.[147]

From the beginning, the Indian constitutional vision was one of "fraternity." In this light, it is somewhat unsurprising that the Court would gesture toward implications for private actors even as the case itself created obligations only for the state. As a practical matter, this digression in the Court's argument may foreshadow future moves to hold public accommodations accountable for this extension of the Constitution to gay rights, contingent, of course, on individual justices' inclination to develop horizontal application further and to do so in the particular arena of gay rights.[148]

Apart from laying judicial groundwork for horizontality in such dicta described above, a symbolic element pervades this and other decisions,[149] in a way similar to how the Constitution itself includes both material and expressive elements. In discussing the significance of the Directive

[147] *Nautej Singh Johar and Others v. Union of India,* AIR 2018 SC 4321, para. 134, emphasis added.

[148] As explained earlier, the proclivities of individual justices, arguably, are an even more important consideration in the Indian context than other jurisdictions insofar as cases of the Indian Supreme Court are assigned and decided in panels. (For a related discussion, see Green and Yoon, "Triaging the Law.") This means that the future development of horizontality depends on cases that raise the issue at all being assigned to justices inclined to develop the practice further. The fact that Justice Dhananjaya Chandrachud assumed the role of chief justice in November 2022 bodes somewhat well for horizontality in India as he wrote the concurring judgment that would apply Article 17 horizontally in *Indian Young Lawyers' Association v. State of Kerala,* also known as the *Sabarimala* case. Of course, other important variables remain in play, including party and institutional relations and even the pipeline of cases (remote interview with Gautam Bhatia, March 24, 2021).

[149] The Court speaks similarly in a couple of other passages in the 2018 judgment. See para. 52: "In a constitutional democracy committed to the protection of individual dignity and autonomy, the state and every individual has a duty to act in a manner that advances and promotes the constitutional order of values"; and para. 250: "To change the societal bias and root out the weed, it is the foremost duty of each one of us to — stand up and speak up against the slightest form of discrimination against transgenders that we come across."

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Principles, Marc Galanter explains, "The compensatory discrimination policy is not to be judged only for its instrumental qualities. It is also expressive: through it Indians tell themselves what kind of people they are and what kind of nation."[150] In a similar vein, in the most influential understandings of the Indian constitutional project, the public and the private were never essentially distinct; rather, both spheres speak equally and speak together to what "kind of people" and "what kind of nation" India aims to be.

Conclusion

While it would be an overstatement to say that Indian constitutionalism includes a developed practice of horizontality, this chapter shows certain republican theoretic themes in the discourse that have the potential to support more extensive horizontality, particularly with respect to equality rights. In various episodes, constitutional actors have connected the success of the constitutional project with what transpires in private spaces. From the arguments of such crucial figures as B. R. Ambedkar to the 2011 *IMA* case, understandings of private actors as having constitutional duties emerge. Indeed, some constitutional actors have understood such duties to emerge not only from those rights enumerated in Part III but also potentially from the Directive Principles of Part IV. Contrast this with the early adoption of a strict vertical model in the United States. That there exists a separate private sphere not subject to constitutional standards steers much of the discourse in that context. This is true even in spite of arguments of the Civil Rights Movement premised on more ambitious understandings of equality and of citizens' duties. In both contexts we find some republican potential in early formulations and ensuing debates concerning equality's horizontal application. As courts and constitutional actors continually question whether horizontality emerges from the constitution, however, the discourses in these two constitutional orders tend to exhibit different presuppositions – namely, presupposing vertical relations in the United States, and admitting, or creating, space for some understanding of horizontal relations in India.

[150] Galanter, *Competing Equalities*, 562; see also Brettschneider, *When the State Speaks*. The theme of expressive value that some perceive in applying rights horizontally will recur throughout these chapters.

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The aforementioned cases notwithstanding, the Indian Supreme Court has not frequently enforced constitutional commitments to equality and antidiscrimination in its case law. Likewise, these commitments have often proven not to take root in civil society as a practical matter, as evinced in ongoing social boycotts and the lack of national antidiscrimination law.[151] However, these established constitutional commitments continually inform debates to presuppose that public ends bear on private spaces and that private entities may have constitutional duties. Recurring in Indian constitutional discourse, including in official accounts, is an understanding of equality as seeking more substance, and as aiming toward fraternity among citizens. In this way, Indian constitutionalism points toward a horizontal project, and one that constitutional actors frequently articulate in republican terms.

[151] The Anti-Discrimination and Equality Bill was introduced by Shashi Tharoor, MP, in 2017 but lapsed with the dissolution of the Lok Sabha (Tarunabh Khaitan, "Anti-Discrimination Bill Project," accessed September 13, 2022, https://sites.google.com/site/tarunabh/Home/discrimination-law).

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