Equality
Does the Constitution Apply Horizontally?

This book now turns to various constitutional orders to examine republican themes in actual debates over the horizontal application of rights. These contexts raise similar questions about horizontality, although under different circumstances and with different forces in play. These chapters do not constitute case studies in the sense that the selection of contexts aims at providing any causal conclusions; rather they are examinations and, ultimately, illustrations of the republican potential of horizontal application in practice. In Kim Lane Scheppele's words, these chapters begin to construct different repertoires for a republican understanding of horizontality.[1] These chapters are by no means exhaustive, but attempt to draw from contexts that, for one reason or another, are paradigmatic for the question of horizontality. In this way, they together sketch a kind of preliminary picture to understand horizontal application through the lens of republican theory.

Chapters 3 and 4 examine political histories and key court cases from the United States and India, respectively. Together, these histories show how republican themes have figured into discourses that aim to justify the introduction of horizontal application in constitutional politics. (The subsequent two chapters on Germany and South Africa differ in that constitutional actors in these contexts largely *presuppose* a doctrine of horizontality, instead raising questions about how far the practice ought to extend.) In the United States the inquiry begins after the adoption of the Fourteenth Amendment, insofar as the text of the amendment does not explicitly proscribe or provide for horizontal application. In contrast, and partly as a result of lessons learned from the United States' record on racial equality, the Indian framers included in their constitutional text provisions that clearly contemplated horizontality. The inquiry in India, therefore, begins in earnest during the ratification debates. While textual

[1] Kim Lane Scheppele, "Constitutional Ethnography," *Law and Society Review* 38:3 (2004), 389–406.

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provision need not necessarily translate into jurisprudential action pursuant to horizontality, it sets a different constitutional scene in which the debate will unfold. The common question, then, recurring in both the United States and India, is whether the constitution permits horizontality, in general and in particular cases. As ever, different actors and institutions in both countries have offered varied answers. In those instances where constitutional actors have favored some practice of horizontal application, republican themes of a common good and duties of citizens emerge. Likewise, the primacy of rights less connected to public ends emerges in those arguments wedded to a more traditional vertical model.

In both the United States and India, as well as the other contexts this book considers, some of the most instructive interchanges unfold around the issues of equality and antidiscrimination. That this proves to be a kind of flashpoint in horizontality debates is perhaps unsurprising, as constitutional commitments to equality often engender larger projects and, thereby, more extensive duties than do other commitments. Moreover, the application of some version of these duties to private actors is liable to be tendentious to the extent that they involve the limitation of other rights, often liberty rights.[2]

Both the United States and India have histories tainted by social stratification and caste.[3] Even after adopting constitutional commitments to equality and antidiscrimination, the nature and reach of these commitments hung in the balance in both countries. Indeed, the fact that these countries' constitutions include remedial provisions raises questions about the scope and horizontal application of their commitments – whether the rights in their constitutions entail only a limited or formal equality or a more ambitious vision, and whether these rights obligate state actors only or nonstate actors as well.[4] As systems of inequality are frequently rooted in individual practices and beliefs, both countries

[2] Georg Sommeregger, "The Horizontalization of Equality: The German Attempt to Promote Non-discrimination in the Private Sphere via Legislation," in *The Constitution in Private Relations,* ed. András Sajó and Renáta Uitz (Utrecht: Eleven, 2005), 33–53; Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Cape Town: Juta, 2012), 326–327.

[3] See Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Cambridge, MA: Harvard University Press, 2019); Martha Nussbaum, "Ambedkar's Constitution: Promoting Inclusion, Opposing Majority Tyranny," in *Assessing Constitutional Performance*, ed. Tom Ginsburg and Aziz Huq (Cambridge: Cambridge University Press, 2016), 295–336.

[4] Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006); Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights," *Michigan Law Review* 102 (2003), 387–459; Mattias Kumm, "Who Is Afraid"; Mattias Kumm and Victor Ferreres Comella, "What Is So Special about Constitutional

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naturally have had to confront whether and how new commitments to equality and nondiscrimination would bear on the private sphere. Early decisions launched different political-constitutional discourses that would evolve amid later opportunities to revisit the meaning of equality – whether as a right in a more formal or limited sense, or a more extensive end toward which to endeavor across spheres.

Chapters 3 and 4 show how constitutional actors in the United States and India debated the role private actors would play in securing constitutional commitments, particularly equality and nondiscrimination. At least some constitutional interpreters in both contexts understood the public–private divide as crucial to respecting rights and determining what actors maintained constitutional duties at all. That is, only public or state actors were deemed responsible for upholding constitutional rights. In contrast, other interpreters emphasized broader ends they found in the constitution, defining constitutional requirements and duty-bearers based on what the constitution ultimately aimed to accomplish. While the public–private divide persists, these latter constitutional arguments admit more space in which to find duties for private actors. Republican-inflected discourses tend to emerge from such constitutional understandings.

While constitutional actors in the United States and India have taken up similar questions regarding horizontal application, the particular challenges naturally differ between countries. One of the major questions that confronted constitutional actors in the United States was whether the Constitution's commitment to equality provided congressional authority to enforce that equality in privately owned places of public accommodation. The Centrist Republicans distinguished between civil and social rights in a way that cabined equality's reach, while Radical Republicans insisted on a more capacious understanding of congressional power to secure this end. Similar questions were resurrected decades later during the Civil Rights Movement when different actors, including the demonstrators, made similar constitutional arguments. In contrast to the US Constitution's Fourteenth Amendment, the Indian Constitution included stronger textual basis on which to argue that equality and, more specifically, antidiscrimination would indeed require cooperation from private actors. The crucial questions were, therefore, concerned with the status of horizontality as a matter of fact and application, rather than with the foundational principles. For example, the Indian Supreme Court confronted questions about what

Rights in Private Litigation?" in *The Constitution in Private Relations*, ed. András Sajó and Renáta Uitz (Utrecht: Eleven, 2005), 241–286.

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the rights guarantees of Part III of the Constitution meant for duties of private entities and, controversially, whether the constitutional ends articulated in the Directive Principles of Part IV might translate into any enforceable duties of private actors.

The comparison between the United States and India is not to suggest a false equivalence either in their histories or in their constitutional projects. Indeed, both inequality and equality have taken different forms in each country's experience, and their constitutional states of affairs are the result of many historical accidents. From the Reconstruction Era through the years of Jim Crow, blatant racism pervaded much of America, including many of its governing institutions. Moreover, the laissez-faire understandings of politics that prevailed at the time the Fourteenth Amendment was adopted sustained early formulations of the state action doctrine, favoring a vertical model of rights. On the other hand, not even eighty years after American Reconstruction, India's constitutional moment emerged into a different time and world. While both the caste system and religious conflict continually plagued the country, the fact that the Indian Constituent Assembly coincided with the adoption of the Universal Declaration of Human Rights attests to the fact that this was a new era for understandings of equality and rights in general. Given such historical contingencies, it is unsurprising that the pursuit of equality in these countries would raise somewhat different issues and take different forms.

Viewing the arguments of constitutional actors through a republican lens reveals theoretic potential in the discourses. More often than not, these actors did not intend to draw from republican theory, yet these chapters show how their arguments do track a republican logic. Moreover, these chapters identify a category – a republican category, as it were – of discursive-political resources constitutional actors can employ, and have employed, when contemplating whether to introduce a practice of horizontality. On this basis, it is instructive to draw from such different constitutional orders – one, a product of the eighteenth century and committed primarily to classical political rights; the other, one of the most ambitious constitutions of the Global South and assuming a wider array of rights obligations. The theoretical nature of this project calls for examining the crucial questions across time and place in this way. As the following two chapters illustrate, many of the answers offered show a common republican parlance across time and place, characterized by arguments pointing toward a common good and new duties of citizens.

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