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Modern Constitutionalism and the Indian Founding

A dissertation presented

by

Madhav Khosla

to

The Department of Government

in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

in the subject of

Political Science

Harvard University

Cambridge, Massachusetts

September 2017

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Modern Constitutionalism and the Indian Founding

Abstract

This dissertation is a study of the political thought of India's constitutional founding. More than half of the world's constitutions have been written in the past three decades. Unlike the eighteenth century constitutional revolutions, these recent revolutions have taken place in countries characterized by religious, ethnic, and social divisions, as well as low levels of growth and education. The creation of democracy in such conditions has been a challenge – and an answer to traditional accounts which regarded such conditions as unfit for self-government. The Indian post-colonial founding exemplifies the twentieth century challenge of constitution-making alongside democratization in such an inhospitable environment. This dissertation considers how the question of democratization shaped the Indian constitutional vision. By unpacking the founding approach towards written constitutionalism and judicial power, centralization and modernization, and representation and citizenship, I reveal the legal architecture that was intended to make popular rule possible. In doing so, I highlight the first major twentieth century response to nineteenth century scholars of democracy, a response which argued that democratic norms emerged from democratic practice rather than the other way around.

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Acknowledgments

This project has only been made possible by the support of a great many. Not everyone who helped has been mentioned, but the following were indispensable. I should like to first thank my dissertation committee. Richard Tuck, my advisor, revealed to me the intimacy that one could share with knowledge and taught me the meaning of intellectual courage. David Armitage made me expand my horizons, both temporally and geographically, while being an extraordinary source of assurance and encouragement. Karuna Mantena helped me problematize historical materials, helping me see that arguments could be right even when historical interpretations were unconvincing. Nancy Rosenblum allowed me to notice how political theory was about feelings, and how feelings had ways to relate to the truth. Mark Tushnet, with his quiet and gentle wisdom, ensured that I remained sensitive to the character of constitutional argument. Above all, each member of my committee showed me the possibilities of teaching and mentorship; for that lesson alone, I remain more grateful than I can say.

Daniela Cammack, David Singh Grewal, Ramachandra Guha, Devesh Kapur, and Srinath Raghavan watched over this project – and my own well-being – with profound care and concern. A number of individuals at Harvard University – both in the political theory community and elsewhere – were kind enough to speak with me about my work. Even brief conversations often suggested an idea, or simply a moment of pause. Thanks are especially due to Eric Beerbohm, Noah Feldman, Samuel Moyn, Eric Nelson, Parimal Patil, Michael Rosen, Michael Sandel, and Amartya Sen. At Harvard, the Graduate School of Arts and Sciences, the South Asia Institute, and the Weatherhead Center for

International Affairs all provided generous support. Special thanks are of course due to the Department of Government, and to Thom Wall who kept everything on track. Much of the final writing for this dissertation was undertaken at Columbia Law School, where I had the privilege of serving as the inaugural B. R. Ambedkar Academic Fellow. I am thankful to Dean Gillian Lester for the opportunity to be part of such a terrific community. At Columbia, I learned considerably from my conversations with Jagdish Bhagwati, Akeel Bilgrami, Vincent A. Blasi, Jessica Bulman-Pozen, Jamal Greene, Olatunde Johnson, Sudipta Kaviraj, Jeremy Kessler, Henry Paul Monaghan, David Pozen, and Jedediah Purdy. A third institution to which I remain grateful is the Centre for Policy Research, New Delhi, which offered me an intellectual home during the many months that I spent in India. In addition, Bruce Ackerman, Akhil Reed Amar, Shyamkrishna Balganesh, Aharon Barak, Sujit Choudhry, Rohit De, Rosalind Dixon, Tom Ginsburg, Samuel Issacharoff, Niraja Gopal Jayal, Sunil Khilnani, Uday Singh Mehta, Aziz Rana, Nicholas Robinson, Rahul Sagar, Kim Lane Scheppele, and Arun K. Tiruvengadam provided vital support and help of various kinds.

This project repeatedly exposed to me to my limitations, but it also offered me the chance to discover great friendships. Uday Raj Anand, Kiel Brennan-Marquez, Keshav Desiraju, Cyril Darlong Diengdoh, Keshava Guha, Rachael Israel, Prashant Jha, Hugo Leith, Neel Maitra, Jackie McArthur, Justin McCarthy, Parth Phiroze Mehrotra, Ananth Padmanabhan, Vishnu Vardhan Shankar, Mala and Tejbir Singh, Vinay Sitapati, Alex Travelli, and Milan Vaishnav maintained my faith and consistently offered me meaning. In Cambridge, Ahsan Barkatullah, Greg Conti, Adi Dasgupta, Sungho Kimlee, Tsin Yen Koh, Abhilasha and Ashok Mehta, Michael Mencher, Zeynep Pamuk, Viney Sawhney,

Will Selinger, and George Yin made graduate school every bit as worthy as it should be. In New York, Lexy Benaim, Avis Bohlen, Abby Fradkin, Jeffrey Gordon, Juliana Han, Jessica Loudis, Luke Mayville, Nicholas Mulder, and Andrew Nicol made the city feel less alienating than it often was.

To some individuals my gratitude is greater still. This project would neither have commenced nor concluded without Pratap Bhanu Mehta. He has been the touchstone in both matters of skill and matters of virtue. Bipin Pradip Aspatwar has taught me nearly everything I know. Every friendship is a gift, and his friendship has been the finest gift of them all. I am grateful to my family – Harish Khosla, Radhika Khosla, Akshay Mangla, Suchinta Sawhney, and the Soods – for their love and forbearance. To my parents, Amita and Rajiv Khosla, my debt is of an altogether different nature. To say more about them would be to debase the currency of gratitude.

Epigraphs

The end of our Indian Empire is perhaps almost as much beyond calculation as the beginning of it. There is no analogy in history either for one or the other.

John Robert Seeley, *The Expansion of England*, 1883

Our major difficulties in India are due to the fact that we consider our problems – economic, social, industrial, agricultural, communal, Indian states – within the framework of existing conditions. Within that framework, and retaining the privileges and special status that are part of it, they become impossible of solution.

Jawaharlal Nehru, *The Discovery of India*, 1946

Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic.

B. R. Ambedkar, Constituent Assembly Debates, 1948

1

Introduction: The Indian Problem

I

As the year 1946 drew to a close, Jawaharlal Nehru introduced the Aims and Objects Resolution in the Constituent Assembly of India. It was an act of great moment, a formal declaration of the terms under which Indians would perform the rituals of self-rule. Yet Nehru, who was soon-to-be independent India's first Prime Minister, spoke with a hint of regret. "One of the unfortunate legacies of the past," he observed, "has been that there has been no imagination in the understanding of the Indian problem."[1] Nehru sensed that Indians were yet to grasp the import of their revolution. For him, the Indian revolution matched the American, French, and Russian in historical meaning. Much like these defining flashes in modern constitutionalism, the event was exceptional for the problem it had been asked to solve. This study of the political thought of India's constitutional founding is an effort to take seriously Nehru's suggestion.

To appreciate "the Indian problem" – to uncover the singularity in the making of modern India – is to consider the shape that ideas about democracy took in an age of empire. When Alexis de Tocqueville and John Stuart Mill proposed that democracy was unsuited to certain societies, that it mandated the presence of background conditions to

[1] Speech by Jawaharlal Nehru, Constituent Assembly of India, 13 December 1946, in *Constituent Assembly Debates* (Volume 1) (New Delhi: Lok Sabha Secretariat, 2009 [1950]) p. 64.

enable its existence, their vocabulary was familiar to the nineteenth century.[2] Constitutional theorists like Walter Bagehot and Albert Venn Dicey spoke in similar terms. They found it natural that the nature of government rested upon its neighboring environment.[3] In a way, such scholars committed the sin of essentialism. They followed in the rich tradition of James Mill, whose *History of British India* had made it known that Indians just were a certain kind of people.[4] The *History of British India* had revealed the innate nature of Indians with astonishing detail: untold aspects of Indian social and cultural life were dissected; each shred a mark of deviation from the Western world. In performing this task, such works had taken the Hobbesian distinction between pre-political and political passions and turned it on its head. The drivers of human action were no longer the consequence of politics but rather its cause; a scenario that Thomas Hobbes would have regarded as placing the cart before the horse.

But there was more than essentialism to the nineteenth century's turn from the radical institutional imagination of the previous century. Anxieties about the spread of democracy arose in the face of two changes. The first was the discovery of society – the encounters with modes of interaction and solidarity beyond the alienating confines of political life.[5] The second was the emergence of the economy. The rise of a commercial

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[2] See Alexis de Tocqueville, *Democracy in America* (2 Volumes) (Arthur Goldhammer trans., New York: Library of America, 2004 [1835-1840]); John Stuart Mill, *On Liberty*, in *On Liberty and Other Writings* (Stefan Collini ed., New York: Cambridge University Press, 1989 [1859]); John Stuart Mill, *Considerations on Representative Government* (New York: Cambridge University Press, 2010 [1861]).

[3] See Walter Bagehot, *The English Constitution* (Miles Taylor ed., New York: Oxford University Press, 2001 [1867]); A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1st edn., London: Macmillan and Co., 1885).

[4] James Mill, *The History of British India* (3 Volumes) (New York: Cambridge University Press, 2010 [1817]).

[5] See Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010).

space was lively and self-assured, and promised a distinct form of collaboration.[6] The arrival of society and the economy complicated the sovereignty account that someone like Hobbes had been able to neatly offer. At the heart of the Hobbesian project was showing the independence of politics. The objective was to portray the freedom promised by the political sphere. For the nineteenth century, however, the task at hand had acquired greater complexity. To fully understand the existence of society and the economy meant decoding the effect that these spaces had for political life. Did political produce these enclaves of energy – these fresh ways of thinking about freedom – or was politics somehow contingent upon them? Arenas governed by social bonds or commercial exchange were not free in a technical sense. But even though the sovereign power of the state could invariably reach them, they did exert a kind of autonomous force. Their self-sufficiency necessitated a very different conception of power from those that had hitherto existed. In the case of Hobbes, for example, the relationship between power and sovereignty had been relatively easy to frame. The primary threat to politics, at least in *Leviathan*, was the church and, to some extent, noble lords.[7] By the nineteenth century, however, power had become a more dynamic force. The sparkling changes in human activity released by the spaces of the social and the economic could not be ignored. They forced attention on the implications that earlier conceptions of power might hold for conceptualizing sovereignty. The dynamic between power and sovereignty was sought to be worked out in an array of historical contexts. Abbé Sieyès embraced the challenge of

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[6] See David Singh Grewal, *The Invention of the Economy: The Origins of Economic Thought* (Cambridge: Harvard University Press, forthcoming).

[7] Thomas Hobbes, *Leviathan* (Richard Tuck ed., New York: Cambridge University Press, 1996 [1651]).

understanding this dynamic in the context of representation.[8] The *Federalist Papers* sought to come to terms with it within the framework of institutions.[9] In today's world, democratic theory has taken yet another turn, with political scientists and legal scholars urging us to reconsider how power might corrode democratic representation.[10]

The nineteenth century concern with universalizing self-government is a familiar topic in our intellectual life. It has been captured most recently by an outpouring of scholarship on the political theory of empire.[11] This work has established the centrality of colonialism to the political imagination of the nineteenth century. Henry Maine, Tocqueville, and others did not merely reflect on imperialism. Instead, their views were integral to their general theoretical orientation. It is, to put the point plainly, not possible to understand a figure such as John Stuart Mill without seriously confronting his defense of imperial rule. By showing this, the new wave of writing on imperialism has sharpened our appreciation of a great many thinkers. Edmund Burke, with his skepticism towards colonialism, can no longer be clothed as a straightforwardly conservative figure. Moreover, we are now aware of the assortment of reasons and responses that were

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[8] See Emmanuel Joseph Sieyès, *What is the Third Estate?*, in *Political Writings* (Michael Sonenscher ed., trans., Indianapolis: Hackett, 2003 [1789]).

[9] Alexander Hamilton, James Madison, and John Jay, *The Federalist* (Cambridge: Harvard University Press 2009 [1787-1788]).

[10] See Robert Dahl, *How Democratic is the American Constitution?* (2nd edn., New Haven: Yale University Press, 2003); Sanford Levinson, *Our Democratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford University Press, 2008); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop it* (New York: Twelve, 2012); Jedediah Purdy, "Wealth and Democracy", in *Wealth (NOMOS LVIII)* (Jack Knight and Melissa Schwartzberg eds., New York: NYU Press, 2017) 235.

[11] See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999); Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2006); Sankar Muthu, *Enlightenment Against Empire* (Princeton: Princeton University Press 2003); Mantena, *Alibis of Empire*; Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton: Princeton University Press, 2016).

presented in connection with colonialism, the evolution of imperial ideology and its distinct phases, and the conceptual relationship between the case for foreign rule and the idea of freedom.

There is more, however, that remains to be learned. This body of work has been striking for both its historical and philosophical contribution, but it has offered us one side of the story. We now have some understanding of the Western ideology on which empires were built. But we have less appreciation for the colonizers' response to the arguments on which colonialism rested. In the Indian context, the search for self-government developed gradually but from at least 1929 onward – when the Indian National Congress that led this search issued a call for *purna swaraj* (complete independence) – freedom from foreign rule absorbed the nationalist agenda. India's political response has, of course, been covered in important ways, but the intellectual answer to colonialism has been far less explored. How, in particular, did Indians meet the problem of self-government – the conceptual problem of democracy and its preconditions?

II

The act of being governed by another involved acute psychological burdens, both for the ruler and the ruled.[12] Reactions under the weight of this burden were inevitably varied both in form and authenticity. A familiar technique within anti-colonial thought was the

[12] In the Indian context, the definitive treatment of the psychological burdens of colonialism remains Ashis Nandy, *The Intimate Enemy: Loss and Recovery of Self under Colonialism* (New Delhi: Oxford University Press, 1983).

turn to history. Western eyes had seen India as a land of ceaseless conflict and, in some accounts, as a land without history. In G. W. F. Hegel's lectures on the philosophy of history, for example, one saw the ease with which India could be kept out of global history. For Hegel, India was a land that had "remained stationary and fixed".[13] Despotism, even in nations where it held sway, was seen as an ill-fitting form of order. But in India, Hegel contended, it was a natural state of being. The distinctions imposed by caste had "condemn[ed] the Indian people to the most degrading spiritual serfdom".[14] As a result, the Indian people were without self-consciousness and had no understanding of their own independent existence. This meant that India was a place without the exercise of conscious choices, and without the possibility of politics. The Indian mind was littered with "confused dreams"; the ingredients of historical reasoning, an "intelligent, thoughtful comprehension of events, and fidelity in representing them", were nowhere to be found.[15] There was, quite simply, no meaning that one could attach to the phases across which the Indian civilization had voyaged.

It was precisely this permanence – the sin of essentialism – that Indians hoped to counter. This endeavor commonly involved a turn to history. To recover a new past was to anticipate a new future. History could be deployed to satisfy a number of tasks, most notably to puncture the alleged link between Western societies and democratic ways of being.[16] Among alternative renderings of India's past, it is hard to locate a text of greater

[13] G. W. F. Hegel, *The Philosophy of History* (J. Sibree trans., New York: Dover, 1956 [1824]), p. 139.

[14] Hegel, *The Philosophy of History*, p. 144.

[15] Hegel, *The Philosophy of History*, p. 162.

[16] This was visible across the Indian political spectrum. See, for example, Lala Lajpat Rai, *The Political Future of India*, 1919, in *The Collected Works of Lala Lajpat Rai* (Volume 8) (B. R. Nanda ed., New Delhi: Manohar, 2006) 269, pp. 299-308; Subhas Chandra Bose, Presidential Address at the Maharashtra

ambition than Nehru's *The Discovery of India*.[17] Nehru had long acknowledged that the greatest "of all the injuries done by England to India" was the creation of "the slave mentality" – the infliction of a burden that had psychologically incapacitated Indians from asserting themselves.[18] In the grand image that *The Discovery of India* unveiled, India's past was rich in complexity and variety. It had passed through centuries of change and housed countless modes of living, while nonetheless retaining "a spirit that [was] peculiar to it and that [was] impressed on all its children, however much they may differ among themselves".[19]

Colonial histories, by contrast, had imagined the Indian past as empty and uncivil. It was only an external authority that could impose some logic on epochs of futility and madness. In locating a shared Indian experience, in capturing India's resilience in the face of changing fortunes and its accommodative potential in the face of diversity, *The Discovery of India* was a show of extraordinary intellectual imagination. It was a text that had, quite naturally, its distinct limitations. Nehru barely gestured at matters of controversy and made far too little of real tensions. As a work of history, the work would have been a spectacular failure. But this was never its aim. It was instead an act of nation-building with a clear message: India's varied past demonstrated the sheer contingency of

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Provincial Conference, 3 May 1928, in *The Essential Writings of Netaji Subhas Chandra Bose* (Sisir K. Bose and Sugata Bose eds., New Delhi: Oxford University Press, 1997) p. 83. The deeper point here was that there was no essential difference between the East and West, a point that Nehru would explicitly make on a number of occasions. See, for instance, Jawaharlal Nehru, "Evolution of British Policy in India", 1928, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 2) (S. Gopal ed., New Delhi: Orient Longman, 1974) 332, pp. 332-334.

[17] Jawaharlal Nehru, *The Discovery of India* (New Delhi, Penguin 2004 [1946]).

[18] Jawaharlal Nehru, "The Psychology of Indian Nationalism", 1927, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 2) (S. Gopal ed., New Delhi: Orient Longman, 1974) 259, p. 266.

[19] Nehru, *The Discovery of India*, p. 52.

its current enslavement. India had shown itself to be capable of change – to be capable of finding new ways to survive and thrive – across centuries, and it could find such ways again. The study that began from ancient India was used to make a decidedly modern point: that India could be constituted and reconstituted.

The responsibility of constituting India – and constituting it in a particular mold – fell upon the founders of India's Constitution. The challenge before them was of a peculiar kind. The history of modern constitutionalism is typically portrayed as one of particular moments, each immortalizing a distinct set of fears and concerns. With regard to the American founding, for example, these usually include the question of large versus small republics; the possibility of constraining power through institutions; and the prospect of republicanism without monarchy.[20] The Indian founding similarly brought into focus a particular set of issues. These were issues which defined and exemplified the post-colonial constitutional moment. At the heart of this moment – in which constitution-making and democratization occurred simultaneously – lay the question of democracy in an environment unqualified for its existence. Democracy was being instituted in a setting which was poor and illiterate; divided by caste, religion, and language; and burdened by centuries of tradition. These factors placed the decolonized constitution-making process in noticeable contrast with the development of Western nation-states. In the West, the historical path of countries saw improvements in prosperity, stronger administration

[20] The literature here is too vast to cite but definitive contributions include Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press, 1992); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998). See also Bruce Ackerman, *We the People: Foundations* (Volume 1) (Cambridge: Harvard University Press, 1991); Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005). For more recent provocations, see Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (Cambridge: Harvard University Press, 2014); Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (New York: Oxford University Press, 2016).

systems, and the subsequent extension of franchise. Universal suffrage came after a reasonable average level of income had been secured and state administrative systems were relatively well established.

The immediate coming of universal suffrage in India's settings is all the more arresting given democracy's troubled history in the decades preceding the end of British rule. The First World War had brushed aside the major continental empires only to create democratic states that readily collapsed in the 1920s and 1930s. Even where self-rule existed, its outcomes invited apprehension. "Popular government", James Bryce wrote in 1921, "has not yet been proved to guarantee, always and everywhere, good government."[21] The crisis of democracy during the inter-war years exposed the fragility of its foundations. The challenge to political democracy in these years was not lost on major Indian leaders, who wondered what their future might look like in such a rapidly changing world.[22] When democracy returned after 1945, its arrival was anything but a forgone conclusion. Its victory over fascism in Europe was a contingent one that spoke neither to the certainty nor stability of the democratic form.[23] The West, at this time, rarely resisted the chance to inform Indians that democracy may be an alien ideal. When the British Prime Minister Clement Attlee wrote to Nehru to stress the Commonwealth's worth in 1949, he reminded him that monarchical arrangements best suited the Asian people:

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[21] James Bryce, *Modern Democracies* (Volume 1) (New York: The Macmillan Company, 1921).

[22] See, for example, an afterword by Nehru, Narendra Dev, and K. T. Shah to a work by Shah on the Government of India Act of 1935. K. T. Shah, *Federal Structur*e (Bombay: Vora and Company, 1937), pp. 510-511.

[23] See Mark Mazower, *Dark Continent: Europe's Twentieth Century* (New York: Vintage Books, 1998).

> I should have said that the general tradition in Asia is in favor of monarchy. I think this is true of India historically … Republicanism is an alien importation from Europe derived from nineteenth century liberalism and appreciated and understood by a comparatively small intelligentsia. The Asiatic republics are few and of recent establishment. Their record is not very encouraging. They tend to degenerate into dictatorships or oligarchies. They offer a prize for the ambitious authoritarian individual.[24]

Intellectuals too would make similar observations, at times expressing dismay at the constitutional text that was coming into being in India. Philip Spratt, the British thinker and political activist, was only one among many commentators to make brave predictions. The Indian Constitution, he declared, "is in its main outlines a liberal constitution, to be imposed upon a society which is not a liberal society, and cannot be expected to make such a constitution work".[25] The brutal economic and social reality of India, one might note, made visible the contrast between the wave of decolonization in Asia and Africa in the 1950s and 1960s, and the experience in the white colonies. As M. C. Setalvad, India's first Attorney General, noted soon after the nation's independence: "At the advent of freedom, the position of India was in no sense comparable to that in the Dominions of Canada and Australia".[26]

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[24] Jawaharlal Nehru, Letter to to Vallabhbhai Patel, 26 March 1949 (containing a reproduction of a letter from C. R. Attlee to Nehru, 20 March 1949), in *Sardar Patel's Correspondence 1945-50* (Volume 8) (Durga Das ed., Ahmedabad: Navajivan Publishing House, 1973) 5, p. 7.

[25] Philip Spratt, *India and Constitution Making* (Calcutta: Renaissance Publishers, 1948), p. 82.

[26] M. C. Setalvad, *The Common Law in India* (London: Stevens & Sons, 1960), p. 204. There were, one should note – and expect, given the historical circumstances involved – international dimensions to the Indian founding. The moment would make India enter an international community of independent states. Moreover, India's role in that community – as Nehru's aspirations in his years as prime minister make clear – could well reshape the nature of global politics. The international aspect of constitutional moments, though not studied in any great detail in this project, may well be a wider phenomenon that demands greater attention. See, in the American context, David Armitage, *The Declaration of Independence: A Global History* (Cambridge: Harvard University Press, 2007); David M. Golove and Daniel J. Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition", 85 *New York University Law Review* 932 (2010).

III

The special nature of the Indian founding may come as a surprise to contemporary scholars of global constitutionalism. Even though India is almost invariably a blind spot for such scholars, the unusual challenges at the nation's birth were noticed by constitutional thinkers at the time. The Cambridge lawyer Ivor Jennings was among the most celebrated of such figures. As someone who participated in the constitution-drafting efforts in Ceylon and Pakistan and lectured on the new Indian Constitution, Jennings devoted considerable attention to studying how nations liberated from colonial rule could embrace self-government. He made the case that constitutions must be written by keeping local contexts in mind. His attack was on Jeremy Bentham, "who had sat in Westminster working out constitutional principles for countries almost as far apart as China and Peru", and Jean-Jacques Rousseau who, "sitting in Geneva … had drafted a constitution for Poland, a country which he never visited".[27]

Jennings cautioned against indifference to regional realities when it came to drafting constitutions for the decolonized world. A place like India was, after all, lacking in many of Britain's noted features: a basic standard of education and literacy; and broad homogeneity in class, language, and religion.[28] Jennings toyed with a variety of constitutional design techniques which might facilitate self-government, highlighting the indispensable role of factors like political leadership. But it is striking that he felt – even

[27] Ivor Jennings, *The Approach to Self-Government* (Cambridge: Cambridge: University Press, 1958), p. 1.

[28] Jennings, *Approach to Self-Government*, pp. 28-32.

in 1956 – that the question of suffrage should remain an open one. When a country came to decide on suffrage, it would do well to remember that "it may be possible to minimize the risks by creating a limited franchise or by balancing representation".[29] The problems of the postcolonial world had never occurred in Britain "because the franchise was extended gradually".[30] A "narrow franchise, indirect elections, tribal representation may all be quite sensible in colonial conditions" and it would be an error to condemn them "merely because they are regarded as primitive in the Conservative Party Headquarters or Transport House".[31]

Implicit in Jennings' advice was the idea that national sovereignty could be severed from the question of suffrage. A country could be free even if all of its citizens did not have the right to vote. The orientation that Jennings adopted had been visible in colonial assessments of India's political capacity during the first half of the twentieth century. In the Report on Indian Constitutional Reforms of 1918, much was made of the role of "the traditions and habits of thought of the people".[32] India's people were poor and incapable, and its society was without solidarity. The Report spoke the language of civilizational hierarchy and progress through instruction. India may well find itself ready for self-government on some future occasion, but that day had not yet arrived. A sustainable political culture, the Report contended, was based "not so much on statutes

[29] Jennings, *Approach to Self-Government*, pp. 82.

[30] Jennings, *Approach to Self-Government*, pp. 63.

[31] Jennings, *Approach to Self-Government*, p. 65. For the lessons that Jennings drew from the Asian wave of decolonization, see also Ivor Jennings, *Problems of the New Commonwealth* (Durham: Duke University Press, 1958).

[32] Edwin S. Montagu and Lord Chelmsford, *Report on Indian Constitutional Reforms* (Calcutta: Superintendent Government Printing, 1918), p. 85.

and written constitutions, as on the gradual building up of conventions, customs, and traditions".[33] And these latter ornaments were, of course, missing among the Indian people. In subsequent years, India's unpropitious conditions continued to trouble the imperial mind. The Report of the Indian Statutory Commission, submitted a little over a decade later, recommended an extension of the vote to correspond to a growth in adult literacy. This reasoning captured the persistence of the colonial logic. Apart from India's fantastic illiteracy, adult suffrage in its settings was seen as a practical nightmare. One could only imagine the checks and preparations needed when one was "dealing with a mass of illiterate voters".[34] The Report of the Indian Franchise Committee, published two years after, observed that illiteracy prevented an informed outlook towards public affairs and political participation. The task of political education could be partly satisfied by political parties. But India could, alas, boast of little party organization. Conditions such as these led the Committee to reject adult suffrage and "seek a more manageable basis" for running the show.[35]

When Indians had turned to the suffrage question in the nineteenth century, their agenda had been greater involvement in the colonial administration. In the twentieth century, however, the question of suffrage occasionally faded into the background: concern over internal sovereignty declined as external sovereignty became the goal. Yet, the matter did receive some attention and mainstream texts of the Indian nationalist movement often spoke of a wide franchise. The Lucknow Pact of 1916 stipulated

[33] Montagu and Chelmsford, *Report on Indian Constitutional Reforms*, p. 98.

[34] Indian Statutory Commission, *Report of the Indian Statutory Commission* (Volume 2) (London: His Majesty's Stationary Office, 1930), p. 91.

[35] Indian Franchise Committee, *Report of the Indian Franchise Committee* (Volume 1) (Calcutta: Government of India Central Publication Branch, 1932), p. 20.

elections to the provincial legislative councils "on as broad a franchise as possible".[36] The Motilal Nehru Report of 1928 committed India to universal adult franchise.[37] Historical attempts at placing restrictions on the right to vote had, the Report claimed, only harmed those who were excluded. Moreover – and this point was a fundamental one – the Report argued that the very exercise of the right to vote was a form of education.[38] When the Report of the Sapru Committee – an Indian attempt to propose a constitutional scheme that could accommodate different domestic political interests – was published in 1945, it too made the case for universal adult suffrage. In rejecting the Franchise Committee's 1932 Report, the Committee claimed that even though circumstances had changed – the party structure, for example, had evolved – substantial changes in such matters could occur "only *after* full responsible government has been introduced".[39] Staying with this logic, it reiterated the idea it was the very exercise of franchise which would provide the education necessary to enable a responsible politics.[40]

The support for universal adult franchise was further noticeable in proclamations by major political actors. Nationalist leaders viewed restrictions on the franchise as

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[36] Clause I.3, The Congress-League Scheme, 1916, in *The Framing of India's Constitution: Select Documents* (Volume 1) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 25, p. 26.

[37] Report of the Committee of the All Parties Conference, 1928, in *Selected Works of Motilal Nehru* (Volume 6) (Ravinder Kumar and Hari Dev Sharma eds., New Delhi: Vikas Publishing House, 1995) 1, p. 76.

[38] Supplementary Report of the Committee of the All Parties Conference, 1928, in *Selected Works of Motilal Nehru* (Volume 6) (Ravinder Kumar and Hari Dev Sharma eds., New Delhi: Vikas Publishing House, 1995) 131, p. 141.

[39] *Constitutional Proposals of the Sapru Committee* (Bombay: Padma Publications, 1945), pp. 167-8 (emphasis mine).

[40] *Constitutional Proposals of the Sapru Committee*, p. 168. India's first Union Minister of Education estimated that adult literacy levels were at ten per cent at independence. See Maulana Abul Kalam Azad, Speech at a UNESCO Seminar, 2 November 1949, in *The Selected Works of Maulana Abul Kalam Azad* (Volume 4) (Ravindra Kumar ed., New Delhi: Atlantic Publishers, 1992) 137, pp. 138-139.

colonial attempts to curb growing disaffection.[41] Mohandas Gandhi, who returned from South Africa in 1915 and swiftly became the face of India's entire effort at emancipation, boldly declared in 1939 that he was unworried by illiteracy and "would plump for unadulterated adult franchise for both men and women".[42] The thought of B. R. Ambedkar, who took up the cause of the lower castes and later became a major figure in the Constituent Assembly, is significant in this regard. Ironically, the narrowness of Ambedkar's political agenda – his restricted focus on the problem of caste – made him particularly sensitive to restrictions on the right to vote. Qualifications based on education and property during colonial rule meant the de facto exclusion of the lower castes. As a result, the nature and meaning of the right to vote often became a focal point in Ambedkar's negotiations with the colonial government. Before the Southborough Committee on Franchise in 1919, Ambedkar made the case that suffrage could itself serve an instructive role and participation in political life would bring about consciousness among the lower castes. He relied here on the final part of the British thinker Leonard Hobhouse's 1911 text *Liberalism*. This part suggested that

> the success of democracy depends on the response of the voters to the opportunities given to them. But, conversely, the opportunities must be given in order to call forth that response. The exercise of popular government is itself an education … enfranchisement itself may be precisely the stimulus needed to awaken interest.[43]

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[41] See, for example, Motilal Nehru, Speech on the Government of India Act, 18 April 1924, in *Selected Works of Motilal Nehru* (Volume 4) (Ravinder Kumar and Hari Dev Sharma eds., New Delhi: Vikas Publishing House, 1986) 211, p. 212.

[42] Mohandas K. Gandhi, "The Only Way", 25 November 1939, 7 *Harijan* 352. See also Mohandas K. Gandhi, "Illiterates v. Literates", 3 October 1937, in *The Collected Works of Mahatma Gandhi* (Volume 66) (Government of India: Publications Division, 1976) 197.

[43] L. T. Hobhouse, *Liberalism*, in *Liberalism and Other Writings* (James Meadowcroft ed., New York: Cambridge University Press, 1994) 1, p. 112, cited in B. R. Ambedkar, Evidence before the Southborough

A decade later, Ambedkar powerfully proposed that the exercise of franchise was not a privilege but a right. To accept the former, he argued, would mean that the "political emancipation of the un-enfranchised will be entirely at the mercy of those that are enfranchised".[44] To limit the suffrage on the ground of illiteracy was a kind of perversity, because literacy had first been denied to a segment of the population and now that segment was being denied suffrage because they were illiterate.[45] Moreover, it mistakenly presumed that formal literacy was equivalent to a self-capacity to determine one's own choices.[46] There was no apparent relationship between restrictions on franchise and good government. Ambedkar rejected the hypothesis that the gradual extension of suffrage in the West had been based on any philosophy. The staggered expansion of voting rights had occurred for political reasons. It was because the ruling classes wanted to preserve their power, and the stages through which transitions ensued

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Committee on Franchise, 1919, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 1) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 243, p. 261.

[44] B. R. Ambedkar, Report on the Constitution of the Government of Bombay Presidency, 1929, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 2) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 315, p. 337. It seems that Ambedkar did not embrace his own view of suffrage with as much consistency as one might have liked. He observed that,

> With regard to the criminal tribes, it might not be a good thing to give them adult suffrage, because by occupation they are a people who have more the interest of their own particular community in mind, and they are not very particular as regards the means whereby they earn their living; but I do not think that there is any harm in giving aborigines the right to vote.

B. R. Ambedkar, Evidence before the Indian Statutory Commission, 23 October 1928, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 2) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 459, p. 471.

[45] Ambedkar, Report, Bombay Presidency, pp. 338-40.

[46] Ambedkar, Report, Bombay Presidency, p. 341.

were not based on any rationale or ideology.[47] There was no larger lesson to be drawn from this history, no deeper truth that held weight. All one needed to do, Ambedkar claimed at the First London Roundtable Conference in 1930, was "take the trouble of reading the life of Lord Shaftsbury, and the social and political history of England" to see that "the unreformed Parliament was not a blessing to anyone".[48]

To limit the franchise, Ambedkar believed, was to misunderstand the meaning of democracy. It was to proclaim that democracy was solely about the expression of preferences at the ballot box. Instead of falling prey to this vision, one that he saw as impoverished, Ambedkar turned to John Dewey to underline the relationship between democracy and participation. Dewey had regarded a democratic society as entailing more than a particular form of government. At a deeper level, what such a society offered was "a mode of associated living, of conjoint communicated experience".[49] A democracy involved many different avenues of shared interest among its people. This sharing meant that one's actions always had to consider the actions of others, just as the actions of others informed how one chose to act. Such a process meant the end of isolation. One had to react to a world that possessed far greater variety, a process that led to progress and released a great number of capacities that previous forms of narrow behavior had curbed.

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[47] Ambedkar, Report, Bombay Presidency, p. 343.

[48] B. R. Ambedkar, First Roundtable Conference, 22 December 1930, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 2) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 501, p. 558.

[49] John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: The Free Press, 1997 [1916]), p. 87. Ambedkar does not specifically reference *Democracy and Education* but it appears from his writings that this is the work he draws upon. On Dewey's conception of democracy, see also John Dewey, *The Public and Its Problems: An Essay in Political Inquiry* (Pennsylvania: Pennsylvania State University Press, 2012 [1946]).

It is easy to see why Ambedkar found this account compelling. It was, after all, an account focused on moving beyond the segregation that rigid group differentiation imposed. Drawing on Dewey, Ambedkar saw in the right to vote the power to regulate the terms on which one's life would be lived with regard to others. To have such a right was to have the opportunity to determine the conditions on which inter-personal relationships would be directed. If democracy was agreed to be about shaping the associations in one's life, a limitation on suffrage would place the lower classes under the control of the powerful. It would mean that such classes would be deprived of chance to shape the interactions in their life. Rather than enabling responsible government, suffrage restrictions were therefore a form of coercion: "Just as the capitalist must have the power, if he is to have any constitution, to dictate how he shall live on terms of associated life with the labor, surely the laborer is entitled also to have the power to regulate the terms on which he shall live with his capitalist master."[50]

IV

When Independence arrived two decades later, such arguments no longer needed to be made. Universal adult franchise was a fait accompli for India's political elite. A century earlier, Indian political thought had been preoccupied with the question of how its nation had fallen prey to foreign hands. This nineteenth-century inquiry led to a remarkable degree of self-reflection. It produced a number of individuals who were both critics of alien rule and Indian society. The critique of the British often went alongside systematic

[50] Ambedkar, First Roundtable Conference, 22 December 1930, p. 559.

assessments of the costs imposed by their rule. A noteworthy strain of thinking, for example, carefully showed how British economic development was made possible by the transfer of wealth from India.[51] As the twentieth century unfolded, Indians turned their attention away from the loss of freedom to how it might be regained. This shift resulted in intense disagreements over political action, seen for example in the divide between the moderate and extremist camps of the Indian National Congress that split the party in 1907, and more conceptual puzzles, like whether social reform must precede or follow political reform.

As self-rule became the objective of India's political struggle, a body that would draft a constitutional text for the new nation began to acquire a place in the nationalist imagination. It was only when "the Indian people settle their own constitution in a popularly elected constituent assembly", Nehru noted in 1933, that India's various political conflicts could be resolved.[52] The call for an assembly was a call for non-interference from the British. Gandhi's draft resolution in 1940, which was approved by the Congress's Working Committee, declared that the "people of India alone can properly shape their own constitution and determine their relations to other countries of the world, through a constituent assembly elected on the basis of adult suffrage".[53] It confirmed the faith that such an assembly might solve the problem of communal representation. This

[51] See Dadabhai Naoroji, *Poverty and Un-British Rule in India* (Delhi: Government of India Press, 1962 [1901]); R. C. Dutt, *The Economic History of India* (2 volumes) (New York: Ben Franklin, 1970 [1906]).

[52] Jawaharlal Nehru, "Exploitation of India", 2 October 1933, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 6) (S. Gopal ed., New Delhi: Orient Longman, 1974) 35, p. 40.

[53] Mohandas K. Gandhi, Resolution, 1 March 1940, in *The Collected Works of Mahatma Gandhi* (Volume 71) (Government of India: Publications Division, 1978) 440, p. 441.

assembly would be, the Congress Working Committee declared in May 1946, "sovereign in so far as the framing of the Constitution is concerned".[54]

A body to draft a constitutional text was eventually formed on the basis of the Cabinet Mission Plan of 1946 and acquired legal status under the Indian Independence Act of 1947. The Constituent Assembly, as it was called, consisted of nearly four hundred members and its deliberations lasted from 1946 to 1949, amidst civil war and one of the largest migrations in human history. The document that was drafted came into force in 1950. The work of the Assembly was often performed by specific committees that totaled more than fifteen and covered matters ranging from minority rights to federalism. The drafting committee was chaired by Ambedkar, and B. N. Rau, a civil servant, served as the constitutional adviser and played a critical role throughout. The Constituent Assembly was indirectly elected on the basis of the elections to the provincial legislatures in 1945-46. It is estimated that under these elections only slightly over a fourth of the adult population had been eligible to vote; some estimates are far lower.[55] Although the Assembly lacked social diversity, it emerged as a remarkable forum for the articulation of intellectual disagreements and contrasting viewpoints. Even Gandhi, otherwise a fierce critic of Western political institutions, came around to having some faith in the body. At a time of intense conflict among communities, he hoped that it

[54] Congress Working Committee's Resolution, 24 May 1946, in *The Collected Works of Mahatma Gandhi* (Volume 84) (Government of India: Publications Division, 1981) 482, p. 483.

[55] See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi: Oxford University Press, 1966), pp. 12-13 n. 38 (estimating that 28 per cent of the populace could vote in the provincial assembly elections); Sumit Sarkar, "Indian Democracy: The Historical Inheritance", in *The Success of India's Democracy* (Atul Kohli ed., Cambridge: Cambridge University Press, 2001) 23, p. 35 (stating that elections to the provincial legislatures had taken place on a franchise of "around 10 per cent").

would manage the problem of representation, though he remained skeptical of whether it would affirm his vision of a decentralized India.[56]

An unrestricted suffrage may have been a fait accompli for the Founders but its meaning could not be overlooked. As the Constituent Assembly took up the third and final reading of the Constitution on 17 November 1949, the adoption of democracy gripped its imagination. Even if one were to cast aside illiteracy and social divisions, there was quite simply the administrative undertaking of conducting elections for such a large electorate. Rajendra Prasad, the President of the Assembly, acknowledged that "the mere act of printing [the electoral roll] is such a big and tremendous job that the governments are being hard put to it, to find the presses which will undertake this big job".[57] For a number of members, the choice of an unrestricted franchise was an act of courage.[58] Others were less impressed. For some critics, it was simply an impractical

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[56] See Gandhi, "The Only Way", note 42. See also Mohandas K. Gandhi, "Question Box (Pakistan and Constituent Assembly", 29 June 1940, in *The Collected Works of Mahatma Gandhi* (Volume 72) (Government of India: Publications Division, 1978) 199, p. 200; Mohandas K. Gandhi, "Independence", 28 July 1946, in *The Collected Works of Mahatma Gandhi* (Volume 85) (Government of India: Publications Division, 1982) 32, p. 34. For Gandhi's prior faith in a constituent assembly, see Mohandas K. Gandhi, Statement to The News Chronicle, 4 December 1939, in *The Collected Works of Mahatma Gandhi* (Volume 71) (Government of India: Publications Division, 1978) 6; Mohandas K. Gandhi, "Independence", 17 December 1939, in *The Collected Works of Mahatma Gandhi* (Volume 71) (Government of India: Publications Division, 1978) 44; Mohandas K. Gandhi, "Question Box (Constituent Assembly)", 29 January 1940 in *The Collected Works of Mahatma Gandhi* (Volume 71) (Government of India: Publications Division, 1978) 154; Mohandas K. Gandhi, "My Answer to Quaid-E-Azam", 26 March 1940, in *The Collected Works of Mahatma Gandhi* (Volume 71) (Government of India: Publications Division, 1978) 372.

[57] Speech by Rajendra Prasad, Constituent Assembly of India, 7 October 1949, in *Constituent Assembly Debates* (Volume 10) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 21. See also Speech by Rajendra Prasad, Constituent Assembly of India, 26 November 1949, in *Constituent Assembly Debates* (Volume 11) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), pp. 986-987.

[58] See, for example, Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 8 November 1948, in *Constituent Assembly Debates* (Volume 7) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 336; Speech by R. K. Sidhwa, Constituent Assembly of India, 17 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 624; Speech by Shibban Lal Saksena, Constituent Assembly of India, 19 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 705; Speech by Nandkishore Das, Constituent Assembly of India, 23 November 1949 in *Constituent Assembly Debates* (Volume 11), pp. 850-851.

endeavor.[59] For another, it was "a dangerous weapon" in the absence of education and patriotism.[60] One member went so far as to regard it as "a monstrous experiment".[61]

A more sensible approach, it was proposed, would have been to extend the franchise gradually in the same way as it had been extended in Britain.[62] Inventive proposals were sometimes posited to ensure better government, such as imposing literacy requirements on candidates seeking election.[63] But such suggestions were few and far between. The Assembly never seriously countenanced the idea of limiting suffrage. As Alladi Krishnaswami Ayyar, a noteworthy lawyer and influential member of the Assembly put it, qualifications on the basis of property or education were impossible in a country where few had either – the result would not be government based on consent in any sense of the term.[64] Rather than limiting suffrage, the challenge was how to resolve the problems that it posed. The striking feature of India's constitutional founding is the seriousness with which this challenge was acknowledged.

It is a matter of some surprise that India's democratic origins have been neglected within the history of political ideas. Among scholars of the period, the constitutional

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[59] Speech by B. Das, 17 November 1949, Constituent Assembly of India, in *Constituent Assembly Debates* (Volume 11), p. 637.

[60] Speech by Thirumala Rao, Constituent Assembly of India, 22 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 818.

[61] Speech by Mahavir Tyagi, Constituent Assembly of India, 25 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 963.

[62] Speech by Frank Anthony, Constituent Assembly of India, 25 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 939.

[63] Speech by K. T. Shah, Constituent Assembly of India, 2 June 1949, in *Constituent Assembly Debates* (Volume 8) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 552.

[64] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 23 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 835.

founding itself has provoked hardly any curiosity. Instead, much of the energy available has been expended on the partition of British India. The division of territory was dramatic – yes – but the constitutional moment has been snubbed for a deeper reason. It has been thought to lack any historic significance. Early reflections on the Constitution presented narratives of steady progression: one British statute was followed by another, each successive law marking a shift towards greater Indian involvement, with the process culminating in self-government.[65] This is a familiar methodological trope, where historical ruptures are deemphasized by the weaving of a longer history. More recent studies often repeat the plotlines told by these early reflections.[66] The 1950 text borrowed a number of ideas from the Government of India Act of 1935. It replicated several of the Act's provisions and adopted familiar elements of the British constitutional schema. This fact has led historians to conclude that the Constitution is a mere extension of the 1935 Act.[67]

Such a view rests on an impoverished reading of legal documents. Regardless of the number of words that were taken from the 1935 Act, democratization signified a major break from the past. From 1858 until 1920, when the Government of India Act of 1919 came into force, India's constitutional scheme had no form of executive responsibility to the legislature. The changes introduced by the 1919 Act were severely

[65] See, for example, Alan Gledhill, *The Republic of India: The Development of its Laws and Constitution* (London: Steven & Sons, 1951), pp. 11-12. India's postcolonial setup was seen as a mark of British success in transferring the liberal tradition to India. See, for instance, R. J. Moore, *Liberalism and Indian Politics: 1872-1922* (London: Edward Arnold, 1966), p. 127.

[66] See, for example, Perry Anderson's recent diatribe against Indian nationalism, where he credits the Baldwin cabinet with the core of the Indian Constitution. Perry Anderson, *The Indian Ideology* (New York: Verso, 2013), pp. 106-107. Anderson's study has invited a number of important responses. See, in particular, Sudipta Kaviraj, "The Curious Persistence of Colonial Ideology", 21 *Constellations* 186 (2014).

[67] See Ayesha Jalal, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge: Cambridge University Press, 1995), p. 36.

limited. The arrangement at the central level remained, by and large, the same. At the provincial level, a new system of diarchy meant that ministers were only given control of select "transferred" subjects, and the Governor still retained vast powers. The executive was, as a founding member of the Indian Liberal Party V. S. Srinivasa Sastri put it, "highly pampered".[68] Moreover, provincial autonomy was circumscribed by provisions that allowed the central government to supervise and veto provincial legislation.[69] Though the Government of India Act 1935 ushered in responsible government at the provincial level, its federal scheme at the center failed to start, leaving the arrangement of power at this tier essentially unchanged. The 1935 Act introduced diarchy at the center but, yet again, kept important matters within executive control. Legislatures at the provincial level had greater powers than before, but the power of the governors was by no means trivial. They could, above all, dismiss a validly elected government. For all its changes, throughout its tenure British rule in India remained what the Earl of Minto once described as a "constitutional autocracy".[70] Even if particular measures in the colonial constitutional schema had enabled the government to be minimally representative, it was in no way responsible.[71]

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[68] V. S. Srinivasa Sastri, Kamala Lectures, 1926, in *Speeches and Writings of the Right Honourable V. S. Srinivasa Sastri* (Volume 1) (Madras: Jupiter Press, 1969) 78, p. 120.

[69] See Sections 80A and 81A, Government of India Act, 1919.

[70] Cited in Sir Penderel Moon, *The British Conquest and Dominion of India* (Volume 2) (New Delhi: India Research Press 1999 [1989]), p. 955.

[71] I borrow the distinction between representative and responsible government from Reginald Coupland, who offered a careful if slanted account of colonial constitutional politics. Sir Reginald Coupland, *The Indian Problem 1833-1935* (Oxford: Clarendon Press, 1942), p. 45. For an overview of constitutional law and politics prior to Indian independence, see Rohit De, "Constitutional Antecedents" in *The Oxford Handbook of the Indian Constitution* (Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta eds., Oxford: Oxford University Press, 2016) 17.

On occasion, the claim of continuity is asserted in a different way. The emphasis is not on colonial measures but on Indian political thought. This narrative presents a long intellectual history of Indian liberalism, and portrays the Constitution of 1950 as natural and inevitable.[72] It is certainly true that the Constitution embraced a number of ideas associated with modern constitutional liberalism – the recognition of rights, the power of judicial review, the principle of separation of powers, and so forth. But this fact is precisely the puzzle at the heart of Indian intellectual history. In the decades preceding the drafting of the constitutional text, Indian intellectual life boasted of an assortment of traditions that would be hard to characterize as liberal.[73] Gandhi's anti-statist vision is the example with which we are most acquainted, but even figures like Ambedkar and Nehru were far from focused on the liberal distinction between the public and the private. The question to be asked is why, without the inheritance any major liberal tradition, did India's political elite nonetheless converge on a set of liberal constitutional values.[74] It was the problem of democratization under Indian conditions, I shall suggest, that offers at least part of the answer to this question. The principles of liberal constitutionalism – the centrality of the state, non-communal political representation, etc. – were seen to meet the challenges posed by the burden of democracy.

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[72] For a noteworthy recent effort, see C. A. Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (New York: Cambridge University Press 2012).

[73] Sudipta Kaviraj, *The Enchantment of Democracy and India* (Ranikhet: Permanent Black, 2011), pp. 15-17; Sunil Khilnani, "The Indian Constitution and Democracy" in *India's Living Constitution: Ideas, Practices, Controversies* (Zoya Hasan, E. Sridharan, and R. Sudarshan et. al. eds., Delhi: Permanent Black, 2002) 64, pp. 65-70.

[74] Kaviraj rightly observes that, given the vibrant criticisms of individualism that had emerged in Indian thought, "the legal structure of the Constitution was a surprising one, since a large part of its fundamental principles and technical legal apparatus presuppose a liberal-individualist understanding of democratic politics". Kaviraj, *The Enchantment of Democracy and India*, p. 292.

Scholars of contemporary India, one should acknowledge, have been alive to its unprecedented democratic form. This reality has often been the framing device for studies of India's postcolonial life.[75] Political scientists have been particularly fascinated by the inexplicable survival of democracy in India.[76] There have been a range of efforts at rationalizing this survival, each trying to understand how India might fit into the universal rules of politics. In the comparative study of politics, there has after all long been a concern with the many parts of modernization occurring at once.[77] Why the sudden expansion in political participation in India's fragile climate did not go haywire, as in so many other postcolonial experiments, has been a subject of genuine inquiry. Global studies of democracy have also paid attention to India's unusual reality. In a recent account it was recognized that India is

> the most surprising democracy there has ever been: surprising in its scale, in its persistence among a huge and, for most of its existence, still exceedingly poor population, and in its tensile strength in the face of fierce centrifugal pressures and high levels of violence, corruption, and human oppression throughout most of its existence.[78]

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[75] A prominent example is Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (New York: HarperCollins, 2007), pp. 1-15.

[76] See Arend Lijphart, "The Puzzle of Indian Democracy: A Consociational Interpretation", 90 *American Political Science Review* 258 (1996); Ashutosh Varshney, "Why Democracy Survives", 9 *Journal of Democracy* 36 (1998); Devesh Kapur, "Explaining Democratic Durability and Economic Performance" in *Public Institutions in India* (Devesh Kapur and Pratap Bhanu Mehta eds., New Delhi: Oxford University Press, 2005) 28; Ashutosh Varshney, *Battles Half Won: India's Improbable Democracy* (New Delhi: Penguin 2013), pp. 11-15. Studies of India's political regime have also often proceeded comparatively, exploring how and why its fortunes have contrasted with Pakistan's. See Jalal, *Democracy and Authoritarianism in South Asia*; Philip Oldenburg, *India, Pakistan, and Democracy: Solving the Puzzle of Divergent Paths* (New York: Routledge, 2010); Maya Tudor, *The Promise of Power: The Origins of Democracy in India and Autocracy in Pakistan* (New York: Cambridge University Press, 2013).

[77] The classic argument in this regard remains Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968).

[78] John Dunn, *Breaking Democracy's Spell* (New Haven: Yale University Press, 2014), p. 103.

But such observations, as the tenor of this passage confirms, have been invitations to learn how democracy has been domesticated in a strange land. The absence of secularization, the low levels of literacy, the lack of a liberal tradition, and so on, have invited assessment over how democracy does and does not work in different settings. Such an assessment is far from irrelevant, but it is concerned with the working of Indian democracy rather than with the decision to be democratic. Simply put, one cannot help notice the little that has been said about how the Founders themselves thought about democratization. The endurance of self-government in India may have encouraged much work within the disciplines of history and political science but it has failed to inspire much interest on how all of this initially came to pass. There is, it would seem, an understanding that even though the Founders embraced democracy with intent, the choice "was unwitting in the sense that the elite who introduced it was itself surprisingly insouciant about the potential implications of its actions".[79]

This was hardly the case. As Ayyar put it in his final address in the Assembly, "The principle of adult suffrage was adopted in no lighthearted mood but with the full realizations of its implications".[80] One member portrayed the risks of blind legal transplantation in vivid terms: "There is said to be a tribe of monkeys in Africa which copy faithfully the houses of men and then live on the outside of them instead of inside. The transplantation of political institutions is not free from this danger of copying the obvious and leaving out the essential."[81] In a speech in the Bombay Legislature in 1939,

[79] Sunil Khilnani, *The Idea of India* (New Delhi: Penguin. 1997), p. 34.

[80] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 23 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 835.

[81] Speech by G. L. Mehta, Constituent Assembly of India, 21 August 1947, in *Constituent Assembly Debates* (Volume 5) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 77.

Ambedkar had similarly asserted that any constitutional arrangement which copied the West without sensitivity to India's conditions would be disastrous:

> Jeremy Bentham must be known to every lawyer, if not to the outside world. Jeremy Bentham was a great legislator; he was a man who indulged in formularies; he was a man who indulged in symmetrical classification of things; he wanted to reform the English law on the basis of pure rationalism. The South American colonies thought that a man who believed in nothing but applying reason and who believed in doing things a priori was a proper person who would be asked to frame a constitution for themselves. They sent emissaries with briefs, I believe, marked, as they usually are for counsel, to draft the constitution. There were innumerable colonies in South America, all spilt out of the old Spanish empire. Jeremy Bentham jumped at the opportunity of drafting constitutions for these new countries in South America. He took great pains and framed the most elaborate documents. I see the Prime Minister laughing because he knows the facts. And, sir, they were shipped all these documents, constitutional documents framed by Jeremy Bentham, were shipped over to South America, for the protection of the life and liberty of the people and for the intonement, if I may say so, of the democratic principle. When they went there, they were tried by the South American people for a few years. And afterwards every constitution that was framed by Jeremy Bentham broke to pieces, and they did not know what to do with the surplus copies that had arrived; and all the South American people decided that they should be burnt publicly.[82]

The answer to the Indian problem could not be found in the inconsiderate copying of Western legal arrangements. Instead, the moment called for a constitutional schema that could meet the challenges of constituting democracy in India's inhospitable environment. This work is a study of the schema that emerged. My focus is on three distinct themes that lay at the heart of the Assembly's deliberations. They capture at once the long

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[82] B. R. Ambedkar, "On Participation in the War", 26 October 1939, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 2) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 242, p. 245.

shadow that democracy cast on the political imagination at the time, and the promise that it offered for a political order on new terms.

The themes express distinct ways by which Indians were placed in a new relationship with one another. I first address the implications that followed from the very act of drafting a constitution. The Founding orientation toward written constitutionalism was aimed at more than simply guiding and informing political action. The impulse toward the codification of rules into a single canonical text intended to create common meanings and explicate norms which other societies could take for granted. Codification was less a way to empower and limit particular actors and institutions, though empower and limit them it did, and more an attempt to generate an understanding of the meaning of such actors and institutions. Rather than solely enable or prohibit action, the text was conceived as a device that could define the role and nature of political actions and the concepts that such actions implicated. The text would have to provide, rather than assume as established, the shared norms on which self-government was predicated. The Constitution, in other words, was imagined to be a pedagogical tool. It would be an instrument of political education – with an aspiration nothing short of building a new civic culture.

The codification of rules was seen as one way to liberate Indians from prior forms of thought and understanding. But liberation was required from other constraints as well. One such constraint was the narrow horizons imposed by localism. This second part of this work considers this concern, and the Founding choice for a strong centralized state. All constitutions limit political authority is some fashion or another. But they also, perhaps more importantly, create such authority. Such instances of creation necessarily

contain judgments over what it means for a body to be a political authority, and which kinds of bodies are able to become such authorities. The choice for a strong centralized state was hardly a self-evident one. Indian intellectual history had a long tradition of local government thought, and several proposals for the reconstruction of India drew on this tradition. The contest over centralization, we shall find, was a contest between the state and society. Supporters of a strong centralized state were distrustful of Indian society's internal capacity for order and change. Their conception of Indian society made the centrality of the state inevitable. The framers of India's Constitution believed that only a centralized state could stand above all other forces, and restructure the moral (and of course legal) relationship among those it governed. And only such restructuring could further a common politics devoted to social and economic transformation, since municipal structures – governmental and non-governmental alike – were thought to be captured rigid social and cultural bonds and prejudices.

Self-determination required Indians to be released from still further pressures. The third part of this work examines the understanding of Indians as political agents in the context of citizenship and representation. India's awesome diversity was routinely referenced as a reason for its incompatibility with self-government. In the colonial era, Indian society was seen as held together by different groups. It was a space where one's identity was asserted through one's community, and power was shared between communities. The Founding replaced this imagery of the nation by a different one. The decades preceding Independence experienced a profound crisis over representation, one that culminated in the partition of British India. Partition marked the failure of years of negotiations performed on communal terms, and opened the door to a conception of

citizenship that was free from the hold of pre-defined identities. The Founding approach toward religion and caste – the two principal divisions – helps us see how participation was imagined in a shared political life. A new logic for political mediation was put in place; one that would move from the balancing of communities to the affirmation of the individual. This shift created a political subject whose interests and identity would be forged in the battlefield of politics.

These themes were the major fault lines in the Constituent Assembly debates. They capture the self-awareness of India's hostile environment as well as the attempt to address the dangers that this environment posed: codification could serve an educative role in a country without established constitutional conventions; centralization could liberate a society seized by local antidemocratic sentiments; and a theory of representation unmediated by forced identities could meet the challenge of diversity. Taken together, these themes highlight the internal cogency of the Indian constitutional project. The liberation from localism was, for instance, a spatial form of the representation story. Both were attempts to rescue individualism from other pressures. In a similar way, codification expressed a commitment to the exercise of power through forms that involved a different kind of interaction than, say, kinship relations. The breakdown of prior structures of power would allow for different allegiances to be brought into the service of a collective political form. And such collective agency would enable a kind of deliberation that would be suitable to modern politics. In their own distinct way, the codification of norms, the existence of a centralized state, and freedom from communal groupings would allow Indians to engage in a new form of reasoning and participation. Together, they could produce *democratic* citizens.

The birth of modern India marked the historical node at which democracy, constitutionalism, and modernity occurred simultaneously. That is to say, it signaled the moment at which a set of processes – the introduction of popular authorization, the creation of rules constituting public authority and participation, the singular authority and centrality of the state, the self-determination of one's identity, the idea of the public and the private – emerged at once. The moment was a historical response to both eighteenth-century failures and nineteenth-century critics of democracy. The historical conditions of its creation should encourage us to see India as the paradigmatic democratic experience of the twentieth century, in much the same way that Tocqueville had seen the United States as the paradigmatic nineteenth-century democracy. The fact that India encountered troubles that earlier moments of democratic creation were able to avoid makes it the new paradigm for what is means to found a democracy in the modern world. This is what makes the experience of Indian democracy not just the experience of one nation but the experience of democracy itself.[83] In the few studies that exist, India's constitutional moment is interpreted variously: some see it as a vehicle for social revolution; some regard it as a monument to state power; and some, as I have noted, see it as a continuation of the colonial legacy.[84] Each of these studies has its finger on some aspect of the truth but they all miss how democracy was seen as constructed through three mutually reinforcing elements: the rule of law, the modern state, and the individualization of identity.

[83] I am grateful to Luke Mayville for this formulation.

[84] See Austin, *The Indian Constitution*; Uday Singh Mehta, "Constitutionalism" in *The Oxford Companion to Politics in India* (Niraja Gopal Jayal and Pratap Bhanu Mehta eds., New Delhi: Oxford University Press, 2010) 15; Uday Singh Mehta, "Indian Constitutionalism: Crisis, Unity, and History" in *The Oxford Handbook of the Indian Constitution* (Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta eds., Oxford: Oxford University Press, 2016) 38; Jalal, *Democracy and Authoritarianism in South Asia*.

The imperial argument against self-government had been, in the ultimate analysis, an argument about the impossibility of collective political agency under certain conditions. The suffrage question in Europe had, after all, been framed through the language of capacity.[85] The fears in the Indian case where not altogether different from those realized in the West: the unraveling of social harmony; the unintelligent and irresponsible exercise of the right to vote; the exploitation of power by those elected to office; the lack of enforcement of a political mandate; and above all the misuse of public power. But Indians answered these fears differently. They met the imperial argument in direct terms by trusting in in the creation of democratic citizens through democratic politics. The conditions thought to infect political activity turned on how that activity had been ordered. A different legal ordering could structure politics differently. The relationship between India's sociological reality and its politics was a contingent one. It was far from necessary, despite what European liberals had so confidently supposed. The making of India's Constitution was a determined struggle to work through what an alternative legal arrangement might be. The reality of imperial politics was that it created a new form of essentialism. It was predicated on the belief that India would have to be mediated by a superior class of men. But what were imagined as immutable facts about Indian life were actually the product of a certain kind of politics. Matters shaped by historical contingencies were seen as following from universal theories. Indeed, the power of politics was that it would find ways to create its own form of essentialism. Someone like John Stuart Mill was, in a crucial respect, correct. The Indian elite shared

[85] On liberalism, the right to vote, and the "discourse of capacity", see Alan S. Kahan, *Liberalism in Nineteenth-Century Europe: The Political Culture of Limited Suffrage* (New York: Palgrave Macmillan, 2003).

the belief that the people had to be educated. But Mill was thought to offer the wrong remedy, for the path to education lay in the very creation of a self-sustaining democratic politics.

2

The Grammar of Constitutionalism

I

Nearly three decades after its publication, the controversial critic of liberal constitutionalism Carl Schmitt returned to his 1932 work *Legality and Legitimacy*. Written just prior to the fall of the Weimer Republic, the work had identified the various constitutional schemas in the modern world, contrasting legislative states, jurisdiction states, and governmental-administrative states. But his original study, Schmitt noticed, was now incomplete. To it, he added an afterword that acknowledged two arresting developments in the interim period. The first was the emergence of the welfare state. Such a state required law by decree, thereby leaving behind the traditional separation of powers model. One could no longer rely on a system in which the legislature had the exclusive authority to make laws. A bureaucracy, Schmitt observed, "no longer gets by with the concept of law, which stems from the classical separation of state and society. Instead, it adapts legal concepts to the welfare state's level of development".[1]

This fusion of administrative and constitutional law took place alongside a further development: a change in the character of constitutions themselves. Constitutions, Schmitt noticed, had become unsatisfied with simply setting the basic framework for politics. Once known by their focus on procedural rules, they had moved on to have a

[1] Carl Schmitt, *Legality and Legitimacy* (Jeffrey Seitzer ed., trans., Durham: Duke University Press 2004 [1958]), p. 98.

substantive character. To demonstrate this shift in identity, Schmitt turned to the newly enacted Indian Constitution:

> The father of the liberal *Rechtsstaat*, John Locke, in an oft-quoted expression directed against enabling acts and legislative delegations, pointedly remarked that the legislature is not there to make legislatures, but rather laws. Analogously, one can say that the constitution-maker and even the constitutional legislature are there to make good legislatures and legislative procedures, and not to make the laws themselves. Otherwise, it would be consistent to issue the constitution immediately as a type of Corpus Juris with a multiyear plan included as an appendix. As noted, there is certainly a tendency in this direction, and constitutions are becoming even longer. Indeed, the new Indian Constitution already has 315 articles and eight appendixes. Whoever finds that right and proper should at least know that it is no longer here a matter of the type of constitution on whose foundation past European constitutional law and its theory of the *Rechtsstaat* and of the separation of powers were formed.[2]

In these few sentences, Schmitt held up for consideration an unusual feature of India's Constitution – its size. With nearly four hundred articles and over ten appendices, the document is customarily referred to as the world's largest written constitution.[3] Indians had portrayed an interest in written constitutionalism for some years prior to the end of colonial rule. The Swaraj Bill of 1895, typically viewed as the earliest attempt at a constitutional text, was drafted over five decades before the Constituent Assembly first met. Yet little emerges in the decades prior to the formal constitution-making process to suggest that codification was to become a defining feature of India's Constitution. Similarly, the Founders drew on a range of constitutional models in exercising the

[2] Schmitt, *Legality and Legitimacy*, pp. 99-100. I am grateful to William Selinger for alerting me to this passage.

[3] The size of the original Constitution of 1950 is different from the current text. Provisions have been added and removed. But the size of both documents is nonetheless awesome.

choices that they faced, but no model quite resembled the approach towards constitution-writing that they finally took. This chapter examines this Founding urge for codification.

It is now commonplace to assert, thanks largely due to H. L. A. Hart, that even though societies might exist without the legal institutions that surround us, only small and relatively simple societies can operate without some basic set of rules. Primitive communities do establish legal relationships, say relationships based on kinship ties. But unless such societies have mechanisms for the creation and identification for rules, for settling differences about the existence and meaning of rules, and for changing and developing rules, their collective being will be burdened by a lack of clarity, by inactivity and stagnation, and by the absence of efficiency.[4] Modern legal systems, partly to prevent such problems, are structured around a set of general rules. Generality enables rules to have broad application and allows them to be impersonal in their operation. The reasons in favor of rules are familiar. Even through rules are necessarily over-and-under inclusive, even though their application will now and again breach the background justification for the rule, rules embody a number of virtues: they enable reliance and facilitate agency, they further efficiency by establishing tests for determining action, and so on.[5]

While a great deal is common about rules, the precise shape that they take can vary considerably. The detail that they embody, both in form and in substance, will have major implications for the actors involved. A fear of how actors might behave – a fear

[4] See H. L. A. Hart, *The Concept of Law* (2nd edn., Penelope A. Bulloch and Joseph Raz eds., New York: Oxford University Press, 1994), pp. 91-99.

[5] See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991), pp. 135-166.

based on the actors' lack of knowledge or understanding, deep-seated prejudices and customary tendencies, etc. – will encourage rule-makers toward greater rule specification. Considerable effort may be taken to lay down the conditions under which the background justification for which a rule applies. Rule-makers will, in other words, acknowledge the absence of a consensus on this justification. It would seem to be the case that when rule-makers undertake such an effort, they regard the circumstances to be such that the negative consequences of greater specification are preferable to those that would follow in the absence of the guidance that specification provides.[6] Rules, after all, require background conditions to work. For a rule to be a source of reliance, for example, both the enforcer and the addressee of the rule must possess some shared understanding.[7] Where shared understandings are not prevalent, rule-makers will have much work to do.

A striking feature of the Founding was the orientation towards constitutional rules. As a general matter, the rules included in a constitution create and regulate institutions whose powers have not been delegated to them from any other institution.[8] To the extent that their powers are delegated rather than inherent, they have at least in modern democratic societies been delegated from the people. This much is as true of the Indian Constitution as it is of others. But the text does more than simply create institutions of inherent power. By and large, exercises of power contain some internal standard for the exercise of that power, and every constitution legitimizes the exercise of power by establishing certain forms of justification. During India's constitution-making

[6] See Schauer, *Playing by the Rules*, pp. 151-152.

[7] See Schauer, *Playing by the Rules*, pp. 138-139.

[8] See John Gardner, "Can There Be a Written Constitution", in *Oxford Studies in Philosophy of Law* (Leslie Green and Brian Leiter eds., New York: Oxford University Press, 2011) 162, pp. 169-174.

process, we notice the determination to specify the internal standards that apply to different powers. The constitutional text was, that is to say, a means for democratic constitutionalism to set up its own test of legitimacy: codification was used to explicate what constitutionalism within a democratic society meant.

The writing of the text aimed at capturing what consensus formation would look like under ordinary conditions of democratization, and at expressing the common knowledge that would obtain were this to happen.[9] This distinct approach towards constitutional codification was motivated, above all, by the fear of uncertainty. It was a response to the creation of a new demos traveling in unchartered territory. The fear extended across the board, whether one had in mind the behavior of voters, legislators, or judges. Regardless of the actor or arena that it targeted, codification sought to provide meaning to action, and to thereby guide, inform, and shape behavior under conditions of sudden empowerment. Though the approach toward codification operated at an institutional level, it was of course linked to a specific understanding of the state. Codification was used to give state power a normative direction, thereby suggesting that certain commitments were necessary for the state to carry legitimacy.

This chapter unfolds by first offering some general observations about the codification exercise. It then explores three choices that illustrate the Framers' outlook: the decision to recognize socio-economic rights but disallow their judicial enforcement; the inclination to provide for a number of other enforceable rights but textually insert the

[9] On the relationship between codification and common knowledge, see generally Josiah Ober, *Democracy and Knowledge: Innovation and Learning in Classical Athens* (Princeton: Princeton University Press), pp. 211-263.

limitations and exceptions to which such rights would be subject; and the preference for procedural due process over substantive due process.

II

To appreciate the distinctiveness of the Founding approach toward codification, one need only contrast it with codification efforts during colonial rule. The colonial state committed extraordinary intellectual and administrative resources to the collation and organization of legal rules.[10] Codification began with the religious laws. For eighteenth century figures like Warren Hastings and William Jones, India was an ancient civilization with long established practices of governance and social ordering. The methodical gathering of such practices – their classification and publication – could provide assistance and guidance for the rulers. Codification held the promise of excavating the tools with which the colonized could be controlled. Moreover, it could rescue the British from depending on natives who understood such practices and profited from their special claims to knowledge. India's rulers could be liberated from the interpretive tricks played by local legal experts, and earlier uncorrupted legal norms could be restored.[11]

The aim of the enterprise was, in other words, to take a body of existing or forgotten social practices and give them concrete legal expression. Such expression would enable their survival in a new institutional environment. When Thomas Macaulay

[10] For a detailed study, see Bijay Kisor Archaryya, *Codification in British India* (Calcutta: S. K. Banerji and Sons, 1914).

[11] See Bernard S. Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996), pp. 57-75.

delivered his noteworthy address on British rule in India in the House of Commons in 1833, he described the sheer chaos that called for codification. The situation in India after the fall of the Mughal dynasty was, Macaulay suggested, akin to the state of Europe after the fall of the Roman Empire. Both Europe and India had, at the time, parallel and competing legal orders. If Italy had to contend with the simultaneous presence of Roman law, Lombard law, Bavarian law, etc., India had to deal with Hindu law, Islamic law, English law, and so on. The result was anarchic:

> In one and the same cause the process and pleadings are in the fashion of one nation, the judgment is according to the laws of another. An issue is evolved according to the rules of Westminster, and decided according to those of Benares. The only Mohametan book in the nature of a code is the Koran; the only Hindoo book the Institutes. Everybody who knows those books, knows that they provide for a very small part of the cases which must arise in every community. All beyond them is comment and tradition. If a point of Hindoo law arises, the Judge calls on the Pundit for an option. If a point of Mohametan law arises, the Judge applies to the Cauzee. What the integrity of these functionaries is, we may learn from Sir William Jones. That eminent man declared, that he could not answer it to his conscience to decide any point of law on the faith of the Hindoo expositor … Sir Francis Macnaghten tells us that it is a delusion to fancy that there is any known and fixed law under which the Hindoo people live; that texts may be produced on any side of any question … in practice the decisions of the tribunals are altogether arbitrary. What is administered is not law, but a kind of rude and capricious equity.[12]

Macaulay was to become a central actor in the codification project that was introduced by the Charter Act of 1833. The nineteenth-century reformers to which he belonged saw their task differently from Hastings and Jones. These new reformers were driven by a Benthamite zeal for rationalism. The intention was no longer to make sense of different

[12] Speech by Thomas Babington Macaulay, 10 July 1833, in *Parliamentary Debates (Hansard)* (Volume 1) (London: House of Commons, 1833), pp. 531-532.

legal orders but instead to create a code of legal rules that could structure social relations in logically intelligible ways. Legal reform came to be seen as a serious project; an enterprise central to the liberal-imperial impulse that drove colonialism. A law commission was established and tasked with revising India's civil and criminal laws, and the Governor-General's Council in Calcutta would now have a law member. The Benthamite project was visible in codifications of laws governing contract, property, evidence, and crime. The starkest example of revolution was the Indian Penal Code 1860, which was "a self-conscious attempt to construct a code de novo".[13] The contrast with English law, which remained uncodified, was plain. "To compare the Indian Penal Code with English criminal law is", James Fitzjames Stephen felt, "like comparing cosmos with chaos".[14] While statutes relating to civil procedure or contract law were less radical than the Penal Code in the context of English law, they were nonetheless committed to the objectives of rationality and internal consistency and to the remaking of Indian society. This commitment is nicely revealed by the formal structure which the codes share. Each legislation followed the identical framework and plan. They all used sections, clauses, short titles, definitions, illustrations, etc. in the identical fashion, making the products seem like the outcome of a one grand design.[15]

Beyond these statutory instruments, there was a third kind of codification witnessed during colonial rule. Statutes from the Regulating Act of 1773 to the

[13] Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010), p. 91.

[14] James Fitzjames Stephen, "Codification in India and England", *Fortnightly Review* 644 (1872), p. 654.

[15] Whitley Stokes, *The Anglo-Indian Codes* (Oxford: Clarendon Press, 1887), pp. xxii-xxiii.

Government of India Act of 1935 possessed a kind of superior constitutional status.[16] These documents divided power among different officials and provided an overarching framework for governance in India. In early years, changes to such laws were motivated by the need to alter either the relationship between the Company and Crown or the relationship among the Crown's officials in India. For example, the working of 1773 Regulating Act witnessed tensions on two fronts: first, between the Governor-General and his Council; and secondly, between the Supreme Court on the one hand and the Governor-General and his Council on the other.[17] Subsequent legislation sought to remedy these tensions and rework these relationships. Statutory enactments in the later years of colonial rule, however, were the product of negotiations with Indians, and were often shaped by on the ground demands for political participation.[18] The Indian Councils Act of 1861 offered one nominated Indian a place in the provisional councils, and later developments would involve a contest over the place and power that Indians would hold in representative posts. These reforms offered constitutional schemes to accommodate different Indian stakeholders, such as granting Muslims separate electorates in 1909 or creating a federation with Indian princes in 1935. But regardless of their differences, these instruments were all essentially concerned with regulating public power and

[16] I do not mean this as a technical claim about the legal status of such statutes. This clarification is required after the decision of the High Court of England and Wales in *Thoburn* v. *Sunderland City Council*, [2003] QB 151. See generally Mark Elliott, "Embracing 'Constitutional' Legislation: Towards Fundamental Law?", 54 *Northern Ireland Legal Quarterly* 25 (2003).

[17] See Anil Chandra Banerjee, *The Constitutional History of India: Volume I, 1600-1858* (Delhi: Macmillan 1977), pp. 66-122.

[18] Rohit De, "Constitutional Antecedents" in *The Oxford Handbook of the Indian Constitution* (Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta eds., Oxford: Oxford University Press, 2016) 17, p. 25.

allocating responsibility among a number of different and potentially quasi-sovereign actors.

These motivations for codification, differed considerably from those underlying the Constitution. The 1950 text was neither an attempt to institutionalize extant social practices nor a way to rationally organize behavior. Prior codification efforts, say those related to civil and penal laws, did of course aspire to bring clarity to legal behavior, but they were not focused on ordering behavior to facilitate a collective political life. It was also distinct from the third kind of codification during the colonial era, the codification visible in the creation of statutes like the Government of India Act of 1935. These laws were, to be sure, long and weighty, but they were aimed at forming a pact and maintaining the peace among different elite participants. They were not attempts to negotiate the realities of popularly authorized institutions.

Studies of the Founding, to the extent that they exist, have ignored the instinct that drove codification. Instead, such reflections have mirrored a broader contest in constitutional theory between constitutions as limiting and constitutions as enabling.[19] Those in the former camp, sometimes called legal constitutionalists, seek to police the boundaries of political action and vest independent institutions like courts with that policing power. Here, constitutions are seen as limiting devices, as mechanism for placing restraints on the exercise of power. Others, fittingly termed as political constitutionalists, focus on the expression of popular sovereignty and the power of representative institutions. Their emphasis is on the right to self-rule as they gently turn

[19] For a recent analysis of the contrasting positions, see N. W. Barber, "Constitutionalism: Negative and Positive", 38 *Dublin University Law Journal* 249 (2015).

their gaze from the Platonic question of what might be correct to the Hobbesian worry about which body ought to be the legitimate decision-maker.

It is tempting to see the Indian Constitution through the lens of legal constitutionalism. Its size might encourage one to suppose – as Schmitt did – that it represented an extreme attempt to limit political action. Schmitt saw the Indian Constitution as a device which did not merely create a legislature but instead went further and effectively enacted laws. There is some truth to this perspective. Several provisions in the text were rooted in a belief that their protection needed to be guaranteed in some special way. Provisions relating to the Election Commission are a notable example. There was a concern that powers relating to the conduct of elections, such as the transfer of electoral officers, might be abused by the executive. B. R. Ambedkar felt "that the greatest safeguard for purity of election, for fairness in election, was to take away the matter from the hands of the executive authority and to hand it over to some independent authority".[20] Another example is the conditions that were meant to secure judicial independence, such as the salaries of judges. While Parliament was empowered to change such salaries, the Constitution specified that this power was only applicable to new judges and that the terms of service of sitting members of the judiciary could not be adversely affected.[21]

We also witness the desire to insulate law from ordinary politics in the granting of particular powers to specific institutions. Take the example of granting the judiciary the

[20] Speech by B. R. Ambedkar, Constituent Assembly of India, 29 July 1947, in *Constituent Assembly Debates* (Volume 4) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 918.

[21] Speech by B. R. Ambedkar, Constituent Assembly of India, 30 July 1949, in *Constituent Assembly Debates* (Volume 9) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 12.

authority to issue prerogative writs. Ambedkar noted that such writs were not new. The writs *habeas corpus* and *mandamus*, for example, were already recognized by Indian law, by way of the Code of Criminal Procedure of 1861 and the Special Relief Act of 1877 respectively. But mere statutory recognition meant that the protection these writs promised was "at the mercy of the legislature".[22] The fact that it was a constitution which now recognized these writs meant that the freedom they guaranteed had a higher degree of entrenchment. They could not, as Ambedkar put it, "be taken away by any legislature merely because it happens to have a majority".[23] On occasion, the decision to elevate certain protections to the constitutional level was accompanied by an open acknowledgement of the distrust of politics. In a discussion on the civil service, say, whose independence was secured constitutionally rather than by statute, one member admitted that he "had no faith in adult franchise".[24] "I do not know", he exclaimed, "what kind of people will come in the future Parliament of India. In the heat of extremism or at the altar of some radical ideology, they may like to do away with the provision that we have made in … favor of the services".[25]

Among contributions on India's constitution-making endeavor, there has also been an attempt to interpret the exercise in opposite terms. The recognition of rights

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[22] Speech by B. R. Ambedkar, Constituent Assembly of India, 9 December 1948, in *Constituent Assembly Debates* (Volume 7) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 953.

[23] Speech by B. R. Ambedkar, Constituent Assembly of India, 9 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 953.

[24] Speech by Brajeshwar Prasad, Constituent Assembly of India, 10 October 1949, in *Constituent Assembly Debates* (Volume 10) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 45.

[25] Speech by Brajeshwar Prasad, Constituent Assembly of India, 10 October 1949, in *Constituent Assembly Debates* (Volume 10), p. 45. See also Letter by Vallabhbhai Patel to All Provincial Premiers, 3 November 1949, in *Sardar Patel's Correspondence 1945-50* (Volume 8) (Durga Das ed., Ahmedabad: Navajivan Publishing House, 1973) 386, p. 393.

alongside explicit limitations, the creation of an executive with sweeping emergency powers, the unitary character of the federal design, the range and depth of state responsibilities imposed by the text, and so on are all thought to make the Indian Constitution a statist document.[26] A number of members in the Constituent Assembly shared this description of the Founding. As one participant, in analogizing the new legal regime with the old colonial one, noted: "none of the existing provisions of the powers of the executive has been done away with; rather, in some respects, those powers are sought to be increased".[27] Rather than the moment being about curbing state power, this account sees it as representing a profound belief in the authority and necessity of the state.

Each of these explanations possesses some degree of accuracy. Some provisions were included in the Constitution to make it harder for legislators to amend them. Similarly, the Constitution recognized the importance of the state, and granted it a great many powers. Yet neither of the two accounts quite captures the animating sentiment behind codification. An emphasis on legality conflates codification with justiciability, and cannot explain why the exercise of judicial power itself evoked much worry. Its mistake follows from a narrow conception of the constitutional mechanisms for de-politicization. A state-centered reading commits the opposite error. It offers a thin analysis of the rules of the text and thereby disregards the many constraints on legislative and executive authority. Such a reading is also hard to reconcile with the persistent fear

[26] See Uday Singh Mehta, "Constitutionalism" in *The Oxford Companion to Politics in India* (Niraja Gopal Jayal and Pratap Bhanu Mehta eds., New Delhi: Oxford University Press, 2010) 15; Uday Singh Mehta, "Indian Constitutionalism: Crisis, Unity, and History" in *The Oxford Handbook of the Indian Constitution* (Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta eds., Oxford: Oxford University Press, 2016) 38.

[27] Speech by Somnath Lahiri, Constituent Assembly of India, 29 April 1947, in *Constituent Assembly Debates* (Volume 3) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 405.

of state power expressed by Indian nationalists. The horror of colonial rule was that it represented, as Jawaharlal Nehru noted in his autobiography, "the ideal police state, and the police mentality pervaded all spheres of government".[28] The struggle for independence was not simply a struggle from alien rule. It was a struggle from the chains of despotism, and a statist reading of the constitutional moment underplays the extent to which the Founders were skeptical of state authority.

On occasion, it is suggested that the Founders embraced the political in a different way. Here they are charged with being evasive rather than decisive; they are alleged to be actors hoping to mitigate social conflict through a strategic adoption of "ambiguous constitutional formulations in the area of personal law and national language".[29] Like the statist reading, this account of constitutional incrementalism casts the moment in an anti-revolutionary light. The strategy, it is claimed, involved "transferring the most controversial choices regarding the foundational aspect of their constitution from the constitutional arena to the political one".[30] Though provocative, such an argument is hard to sustain. It rests entirely on decisions pertaining to two matters, language and personal laws, without any effort whatsoever to explain the vast number of other choices. Besides, it fails on its own terms. The postponement of a uniform civil code was not a strategic form of constitutional deferment. Rather than being the outcome of any grand strategy, it was plainly the product of unsuccessful political negotiations. If the matter was left to

[28] Jawaharlal Nehru, *An Autobiography* (New Delhi: Penguin Books, 2004 [1936]) at 416. See also Jawaharlal Nehru, *The Discovery of India* (New Delhi, Penguin 2004 [1946]), p. 548.

[29] Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (New York: Cambridge University Press, 2011), p. 148.

[30] Lerner, *Making Constitutions in Deeply Divided Societies*, p. 10. On constitutional deferment, see Rosalind Dixon and Tom Ginsburg, "Deciding not to decide: Deferral in constitutional design", 9 *International Journal of Constitutional Law* 636 (2011).

future generations, that was the outcome of the process. It was hardly – as it would have had to be if this was a considered approach towards constitution-making – the aim of the exercise. And as far as language is concerned, the text is hardly vague. Instead it is innovative and precise: the language-related provisions disaggregated the choice of official language into different institutional settings. Rather than bracketing the choice of a sovereign language, the text developed a mechanism through which one language need not triumph at the cost of all others.[31]

The neat distinction between constitutions as enabling and constitutions as limiting has set the terms for contemporary studies on India's constitution-making effort.[32] But the fear of uncertainty that powered the codification mania at the Founding saw a different choice: that between an open-ended and explicit constitutional text. The primary question was not whether the legislature or the judiciary should have more or less power but whether the text could be silent on the underlying norms of democratic constitutionalism. The promise of codification was that it could create common meanings around democratic principles where few such meanings existed. Familiar constitution-making endeavors, whether they were efforts at limiting the exercise of power or enabling it, had already presupposed much shared understanding. But the Indian context offered no shared consensus, and codification was an effort to explicate what that consensus might be.

[31] See Sujit Choudhry, Managing linguistic nationalism through constitutional design: Lessons from South Asia 7 *International Journal of Constitutional Law* 577 (2009).

[32] This typology is only one among many, although it dominates studies of constitutionalism. For a study of constitutional typologies, see Dieter Grimm, "Types of Constitutions", in *The Oxford Handbook of Comparative Constitutional Law* (Michel Rosenfeld and Andras Sajo eds., New York: Oxford University Press, 2013) 98.

The years prior to the formal constitution-making process witnessed the production of a number of written texts. There were both colonial statutes, such as the Government of India Act of 1935, as well as Indian efforts, aimed in different ways at engaging with the colonial state and articulating the terms of freedom. Some texts, like the Motilal Nehru Report of 1928, offered indications of future commitments. They revealed, for example, the important place that social and economic welfare occupied within Indian political imagination at the time. There was also the endorsement of several constitutional principles. From its second session onwards, for instance, the Indian National Congress spoke of the separation of executive and judicial functions.[33] The Sapru Committee Report of 1945 too stressed the significance of judicial independence.[34] But beyond mentioning basic freedoms and highlighting the rule of law, the details of India's future governing document were a relatively open matter when the Constituent Assembly assembled in the winter of 1946.

The enterprise of constitution-making – indeed, the very idea of a written constitution – provoked considerable debate among members of the Assembly. Jawaharlal Nehru prominently expressed concern over excessive codification. He feared that codification would produce inflexibility. It would make the Constitution inadaptable to social and economic change, and thereby make it less likely to endure. For Nehru, a thick theory of codification conflated the difference between constitutions and ordinary legislation. It meant the confusion of higher principles with quotidian matters of

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[33] See Resolutions adopted by the Second Session of the Indian National Congress, 27-30 December 1886, in *INC: The Glorious Tradition* (Volume 1) (A. M. Zaidi ed., New Delhi: Indian Institute of Applied Political Research, 1987) 21, pp. 27-28.

[34] *Constitutional Proposals of the Sapru Committee* (Bombay: Padma Publications, 1945), pp. 190-197.

administration. A constitution overwhelmed with detail, Nehru felt, would lose its character. He held that

> so far as the basic nature of the Constitution is concerned, it must deal with the fundamental aspects of the political, the social, the economic and other spheres, and not with the details which are matters for legislation. You will find that if you go into too great detail and mix up the really basic and fundamental things with the important but nevertheless secondary things, you bring the basic things to the level of the secondary things too. You lose them in a forest of detail. The great trees that you should like to plant and wait for them to grow and to be seen are hidden in a forest of detail and smaller trees. I have felt that we are spending a great deal of time on undoubtedly important matters, but nevertheless secondary matters – matters which are for legislation, not for a Constitution.[35]

Excessive legalism had long troubled Nehru. In the years battling colonial rule, he made clear his disagreement with those who sought constitutional means for gaining power. Rather than drafting "paper constitutions", Nehru desired radical structural change.[36] It was the dependence on precedent that especially aggravated him. "Too much reliance on past practice", Nehru felt, "has somehow succeeded in twisting the lawyer's head backwards and he seems to be incapable of looking ahead."[37] His concern with rigidity was apparent even in his early reflections on the colonial project of codifying India's personal religious laws. For Nehru, the customs and rules of Hindu society had shown remarkable adaptability until British intervention. But putting pen to paper had changed everything. Through codifying "customs and flexible laws on very conservative

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[35] Speech by Jawaharlal Nehru, Constituent Assembly of India, 25 November 1948, in *Constituent Assembly Debates* (Volume 7)) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), pp. 588-589.

[36] Jawaharlal Nehru, "Whiter India?", October 1933, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 6) (S. Gopal ed., New Delhi: Orient Longman, 1974) 1, p. 13.

[37] Nehru, "Whiter India?", p. 13.

principles … it became impossible to change these customs and laws except by fresh legislation".[38]

Nehru was apprehensive that India's radical democratization could lead to situations so unforeseen that rules based on past knowledge would strangle necessary action. Rules promote stable decision-making, a point that Nehru would have readily conceded. Moreover, he remained committed to institutional processes and norms, and acknowledged their value as such. Indeed, it was his fidelity to procedure and civil liberties that separated him from the communists, whose economic sentiments he otherwise shared. His opposition was neither to the formal stability that legal rules promised nor to the need for some canonical legal text that protected democratic principles and regulated state power. It was rather to the character that codification would take. An approach to written constitutionalism that exceeded the basic principles required by democracy and the rule of law would be one incapable of managing political and social instabilities. This would be especially worrisome in India's context, where an unpredictable future suggested a need for greater legal flexibility.[39]

Nehru saw the risk of being bound to intricate, extensive canonical rules in India's circumstances as greater than the risk of some leeway toward actors and institutions. By posing matters in this way, he approached the question of written constitutionalism in its traditional terms, namely as a choice between authorizing and restraining political action. This was a perspective that had support within the Assembly. When such a large document was eventually produced, it became clear to all concerned that the text bore

[38] Jawaharlal Nehru, "Evolution of British Policy in India", 1928, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 2) (S. Gopal ed., New Delhi: Orient Longman, 1974) 332, p. 347.

[39] On the stability of rules, see Schauer, *Playing by the Rules*, pp. 156-7.

little resemblance to standard practice. As one member noted, "we have not been able to keep clear in our mind the distinction between an act of the legislature and the provisions of a constitution".[40] Another observed with sarcasm, "I congratulate Dr. Ambedkar, the Chairman of the Drafting Committee, and the members thereof for producing such a voluminous Constitution in which nothing has been left out … I venture to think that if they had the time they would have even prescribed a code of life in this Constitution."[41]

Yet codification had its advocates, participants whose views eventually succeeded, and it is important to ask why. Flexibility was a valid concern but it could be met, as it was, by way of a relaxed amendment procedure.[42] Those who defended codification, like Rajendra Prasad, claimed that "Constitution should be self-contained as far as possible".[43] "We should not", he observed, "depend on the interpretation of clauses in other constitutions, as it may lead us to any amount of confusion."[44] When Ambedkar was questioned on the Constitution's length and content, he conceded that the decision to incorporate provisions that might otherwise have been left to statutory law was an atypical one. In explaining the rationale for such incorporation, he turned to George Grote's *A History of Greece*. In his study of Athenian democracy, Grote had used the term "constitutional morality" to depict fidelity towards constitutional forms and

[40] Speech by H. V. Pataskar, Constituent Assembly of India, 18 November 1949, in *Constituent Assembly Debates* (Volume 11) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 673.

[41] Speech by Gopal Narain, Constituent Assembly of India, 22 November 1949, in *Constituent Assembly Debates* (Volume 11), pp. 803-804.

[42] See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi: Oxford University Press, 1966), pp. 317-329.

[43] Speech by Rajendra Prasad, Constituent Assembly of India, 29 April 1947, in *Constituent Assembly Debates* (Volume 3), p. 418.

[44] Speech by Rajendra Prasad, Constituent Assembly of India, 29 April 1947, in *Constituent Assembly Debates* (Volume 3), p. 418.

practices. The presence of constitutional morality, Grote had argued, meant the commitment to constitutional means, to its processes and structures, alongside a commitment to free speech, scrutiny of public action, legal limitations on the exercise of power, etc. In this way, constitutional morality signified the combined existence of the ethic of self-restraint as well as the flourishing of freedom; it signified a respect that transcended disagreements and disappointments.[45] Because it functioned so quietly, almost invisible behind the daily drama of individuals and institutions, one might suppose that constitutional morality was a normal, expected feature of constitutional systems. But Grote regarded such an assumption as mistaken. It was a terribly hard attitude to create and sustain within a community, and it was crucial for the endurance of a constitutional order.

Ambedkar was sympathetic to Grote's account and to the place it accorded constitutional morality in the success of Athenian democracy. But he saw the account as incomplete and as providing only a partial account of constitutional failure:

> While everybody recognizes the necessity of the diffusion of constitutional morality for the peaceful working of a democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration has a close connection with the form of the constitution. The form of the administration must be appropriate to and in the same sense as the form of the constitution. The other is that it is perfectly possible to pervert the constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. It follows that it is only where people are saturated with constitutional morality, such as the one described by Grote the historian, that one can take the risk of omitting from the constitution details of administration and leaving it for the legislature to prescribe them. The

[45] George Grote, *A History of Greece* (Volume 4) (New York: Cambridge University Press, 2009 [1847], pp. 204-216.

> question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.[46]

The perversion of a constitutional order, Ambedkar feared, could occur even without upsetting formal constitutional principles. This could happen because a range of matters, often those relating to the daily administration of law, that were typically left to legislatures could destroy a constitutional order without hurting the formal nature of that order. In India's conditions, one needed to fill these matters out; one was required to codify them in the constitution itself. The future could not be taken for granted.

It was only a few years earlier that Ambedkar had doubted the need for a constitution-making body. The American founders, he then observed, "had to evolve ideas, suitable for the constitution of a free people".[47] There were "no constitutional patterns before them to draw upon".[48] But in the case of India, constitutional models were "ready at hand" with minimal "room for variety".[49] The only outstanding issue, Ambedkar at the time declared, was the communal question. But now, in his new role as Chairman of the Drafting Committee, Ambedkar's focus had broadened and the novelty of the Indian experiment became apparent. He underlined the undemocratic foundations

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[46] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 38. See Pratap Bhanu Mehta, "What is Constitutional Morality?", 615 *Seminar* 17 (2010).

[47] B. R. Ambedkar, "Communal Deadlock and a Way to Solve It", May 1945, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 1) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 355, p. 360.

[48] Ambedkar, "Communal Deadlock and a Way to Solve It", p. 360.

[49] Ambedkar, "Communal Deadlock and a Way to Solve It", p. 360.

of modern India, circumstances in which it was "wiser not to trust the legislature to prescribe forms of administration".[50]

III

A persistent theme in Indian political thought in the first half of the twentieth century was the relationship between political independence and social and economic liberty. The promise of democracy was in part the promise of the life that it would produce. But in the absence of democratic norms, uncertainty loomed large over the outcomes that practices of self-authorization would engender. In imagining possible futures, India's leaders searched for an understanding of the relationship between popular self-government and substantive justice. This quest culminated in an interesting if curious feature in the Constitution: a set of social and economic goals – the "Directive Principles of State Policy" – that were binding on the government but judicially unenforceable.

In the last few decades of colonial rule, no Indian thinker offered as sustained a treatment of the relationship between political and socio-economic freedom as Jawaharlal Nehru. Some, most conspicuously Mohandas Gandhi, had taken the radical view that socio-economic transformation mandated decentering the state in the structuring of collective life. In contrast, Nehru resisted the idea that politics was at odds with other domains of freedom. Mainstream Indian nationalism of the 1920s and 1930s had disappointed Nehru. He had seen it as unduly narrow and unambitious.[51] Political liberty

[50] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 38.

[51] Nehru, *An Autobiography*, p. 400.

from alien capture was a worthy endeavor, but Nehru felt that it must lead to tangible improvements in ordinary life.[52] Foreign rule, in other words, was not problematic simply because it had deprived Indians of political agency. An internal critique of the Raj was put forth. The British, Nehru detailed, had ignored education, health, and working conditions, and done nothing for the improvement of material conditions.[53] They had access to India's tremendous resources and were given "a century and a half of unchecked despotism".[54] But all that they had to show for themselves was "grinding poverty, and widespread illiteracy, and general absence of sanitation and medical relief, and a lack of all the good things of life".[55] Even though the world saw shifts in public finance norms – shifts comprising of attention towards "free and universal education, improvement of public health, care of the poor and feeble-minded, insurance of workers against illness, old age and unemployment" – the British ran a totalitarian state, and poured all revenue into the perpetuation of a coercive order.[56]

Colonialism had famously been justified on consequentialist grounds. In Britain's imagination, only a foreign body could maintain harmony on Indian soil. Nehru's effort to respond in consequentialist terms, and thereby to challenge the internal logic of imperialism, was not the first of its kind. Economic nationalists such as Dadabhai Naoroji

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[52] Jawaharlal Nehru, "Swaraj and Socialism", 11 August 1928 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 3) (S. Gopal ed., New Delhi: Orient Longman, 1972) 369, p. 371.

[53] Nehru, *An Autobiography*, pp. 452, 603.

[54] Jawaharlal Nehru, "The Unity of India", 8 October 1937 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 8) (S. Gopal ed., New Delhi: Orient Longman, 1976) 620, p. 621.

[55] Nehru, "The Unity of India", p. 621.

[56] Jawaharlal Nehru, "Before India is Reborn", June 1936 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 631, p. 636.

and R. C. Dutt had, in the early years of the twentieth century, captured India's economic downfall under colonial rule and underlined its exploitative character.[57] Nehru shared Naoroji's and Dutt's interest in material well-being, but went one step further in using the colonial experience to consider the future of freedom in an independent India. For any constitutional order to be meaningful, it would have to be a vehicle for a better life.[58] Nehru found little satisfaction in the constitutional proposals that emerged during the struggle for self-rule. They appeared preoccupied with maters of administration and ignored fundamental questions, such as patterns in land distribution. Such proposals failed to see that, as far as India's masses were concerned, "it was not a matter of a fine constitution drawn up in London or elsewhere, but of a basic change in the land system, especially in the *zamindari* areas".[59] Legislation like the Government of India Act of 1935 did "not touch a single problem of India".[60] Nehru expressed anguish over its silence on "the economic problems – of grinding poverty, of immense unemployment of the middle classes, of the industrial workers, and chiefly of the rural population".[61]

At a time when others focused on political agency, Nehru uttered the bold claim that it was poverty rather than foreign rule that lay at the heart of the Indian tragedy.[62]

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[57] See Dadabhai Naoroji, *Poverty and Un-British Rule in India* (Delhi: Government of India Press, 1962 [1901]); R. C. Dutt, *The Economic History of India* (2 volumes) (New York: Ben Franklin, 1970 [1906]).

[58] See Nehru, *An Autobiography*, p. 175.

[59] Nehru, *An Autobiography*, p. 295.

[60] Jawaharlal Nehru, Interview on the 1935 Act, 27 January 1936 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 79, p. 80.

[61] Jawaharlal Nehru, "India's Problems", 21 February 1936 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 114, p. 115.

[62] See Jawaharlal Nehru, "The Congress and World Crisis", 5 November 1937 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 535, p. 536; Nehru, "The Unity of India", p. 620.

"The Indian problem" was to be viewed "in terms of relieving the poverty and raising the mass of peasants and workers to a human level".[63] This landscape emerged against the backdrop of democratic failure in Europe. In reviewing Bertrand Russell's *Roads to Freedom* in 1919, Nehru reminded his readers that "representative institutions and democracy as prevalent in Western countries at present have proved failures".[64] It was a view that Nehru consistently held over the next two decades. Throughout the 1930s he felt that "the old style of democratic form has ceased to exist"[65] and that "the so-called democratic countries in the West are democratic only in a political sense".[66] It was "not enough to give a vote to a hungry man" and the "failure of democracy in Europe [was] the failure of the one-sided and partial democracy".[67] A democratic regime limited to the political arrangements had proven to be an inadequate answer to the problems of the world.

By 1936, Nehru had come to hold there were only one of two models for state-building on offer: some version of fascism and some model of socialism or communism.[68] Given this choice, Soviet Russia became a natural source of guidance.

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[63] Jawaharlal Nehru, "The Need for Understanding India", 27 June 1938 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 9) (S. Gopal ed., New Delhi: Orient Longman, 1976) 27, p. 28.

[64] Jawaharlal Nehru, "Roads to Freedom", sometime after April 1919 (incomplete review) in *Selected Works of Jawaharlal Nehru* (First Series, Volume 1) (S. Gopal ed., New Delhi: Orient Longman, 1972) 140, p. 142.

[65] Jawaharlal Nehru, "On Fascism and Democracy", 28 October 1933 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 6) 115, p. 115.

[66] Jawaharlal Nehru, Speech at the Inauguration of the Civil Liberties Union at Madras, 8 October 1936 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 432, p. 437.

[67] Nehru, Speech, Civil Liberties Union, p. 437.

[68] Jawaharlal Nehru, Presidential Address to the Lucknow Congress, 12 April 1936 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 170, p. 173.

One had to acknowledge both its "unpleasant aspects" and its tremendous possibility.[69] Even if the Soviet experiment failed, it would be "partly because Russia was a very backward country and partly may be because of wrong methods" but not for any fault with the overall ambition.[70] But while the Soviet experience had many lessons to offer, Nehru warned against blindly copying its methods. A scientific approach to socialism was one in which "the socialist tries to solve the problems of each country in relation to its varied background and stage of economic development, and also in relation to the world".[71] What India required was an adaptation of the Soviet experiment – a commitment to social transformation without violence to civil rights. Nehru's belief in such adaptation came from the nature of India's freedom struggle:

> During the past few years in India, ever since the idea of radical social changes has assumed importance here, it has often been stated that such change necessarily involves the use of violence and cannot therefore be advocated … But, in theory, if it is possible to bring about a great political change by a non-violent technique, why should it not be equally possible to effect a radical social change by this method?[72]

The ends of the Soviet experiment could, it was hoped, be severed from their means. A non-violent route, sensitive to civil rights and the broader landscape of liberal

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See also Jawaharlal Nehru, "Fascism and Communism", 18 December 1933 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 6) 133, p. 134.

[69] Nehru, *An Autobiography*, p. 175.

[70] Jawaharlal Nehru, Letter to Beltie Shah Gilani, 3 December 1933 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 6) (S. Gopal ed., New Delhi: Orient Longman, 1974) 126 at 126.

[71] Jawaharlal Nehru, "The Congress and Socialism", 13 January 1937 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 60, p. 61. See also Jawaharlal Nehru, "Violence and Nonviolence", 16 January 1942 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 12) (S. Gopal ed., New Delhi: Orient Longman, 1979) 76, p. 77.

[72] Nehru, *An Autobiography*, pp. 565-566.

constitutionalism, could arrive at the same destination. But if this were to be possible, Nehru suggested, a new understanding of democratic constitutionalism would have to emerge – an understanding that offered a flexible state, burdened only by basic legal rules. Legislatures would have to "confine themselves to laying down general principles and policies".[73] And the details of policy were to be left to experts.[74] The constitutional order needed to do less rather than more. A constitution, Nehru believed, should make possible "the socialization of society".[75] To achieve such change, it should be a document with "no restrictions". [76]

Nehru put forth the broad commitment to socio-economic change through democratic constitutionalism without presenting further details of the precise legal form that such a commitment would take. The major statements on rights prior to Independence appear to share this quality. Indeed, it would be a mistake to confuse the widespread support for a state-centered economic life with support for judicially enforceable socio-economic rights. The sentiments that were prevalent lacked institutional specificities. Interestingly, even though the Motilal Nehru Report of 1928 drew no formal distinction between rights, and recognized both civil-political and socio-economic rights, it used a different language for the enforcement of the latter. Clause 4(v) of the Report, for example, provided that "citizens in the Commonwealth of India shall

[73] Jawaharlal Nehru, "On Federal Government", 1937 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 8) (S. Gopal ed., New Delhi: Orient Longman, 1976) 595, p. 598. The editor of the selected writings, S. Gopal, credits Nehru with the authorship of this note, but it is worth mentioning that its publication in print was jointly credited to Nehru, Narendra Dev, and K. T. Shah and was the afterword to Shah's book on the Government of India Act of 1935. See K. T. Shah, *Federal Structur*e (Bombay: Vora and Company, 1937).

[74] Nehru, "On Federal Government", p. 603.

[75] Nehru, "On Federal Government", p. 610.

[76] Nehru, "On Federal Government", p. 610.

have the right to free elementary education … and such right shall be enforceable as soon as due arrangements shall have been made by competent authority".[77] No such qualifying statement was made with respect to the civil and political rights, indicating that they would be enforceable with immediate effect. Similarly, clause 4(xvii) declared that "Parliament shall make suitable laws for the maintenance of health and fitness for work of all citizens, securing of a living wage for every worker…".[78] This clause empowered Parliament to enact certain welfare legislation but it did not in itself recognize any socio-economic right, say the right to health or the right to work.

The phrasing of the Indian National Congress's Karachi Resolution of 1931 is equally interesting. The Resolution declared that "political freedom must include real economic freedom of the starving millions".[79] In furtherance of this goal, it committed the Congress to a list of twenty items which a future constitution was to provide. These ranged widely, from adult suffrage to a graduated inheritance tax. The first item in this list contained the "fundamental rights of the people".[80] But the nine rights under this entry did not include any socio-economic guarantee. Such guarantees, like free primary education, were mentioned in other items as individual heads. One should not put too fine a point on the Resolution, not least because it never concerned itself with institutional details like justiciability and enforcement mechanisms. Nonetheless its textual form

[77] Report of the Committee of the All Parties Conference, 1928, in *Selected Works of Motilal Nehru* (Volume 6) (Ravinder Kumar and Hari Dev Sharma eds., New Delhi: Vikas Publishing House, 1995), p. 75.

[78] Report of the Committee of the All Parties Conference, p. 76.

[79] Resolutions adopted by the Forty-Fifth Session of the Indian National Congress, 29-31 March 1931, in *INC: The Glorious Tradition* (Volume 3) (New Delhi: Indian Institute of Applied Political Research, A. M. Zaidi ed., 1987), p. 185.

[80] See Resolutions, Forty-Fifth Session, Indian National Congress, p. 186.

discloses a sense of how freedom was conceptualized, and the belief that "fundamental rights" were in some way different to social and economic protections. What was important about the Resolution, as Nehru recognized in his *Autobiography*, is that it moved beyond previous resolutions which had focused exclusively on political freedom.[81] Gandhi too saw the Resolution as primarily serving a signaling role. The Resolution, he estimated, would "make it clear to the world and to our own people what we propose to do as soon as we come into power".[82]

Somewhat remarkably, it is only when we come to the drafting of the Constitution, from 1946 onward, that we witness genuine debate over social and economic rights. Alladi Krishnaswami Ayyar's note in the Sub-Committee on Fundamental Rights is a noteworthy document in this context. It saw the distinction between enforceable civil-political rights and unenforceable socio-economic rights as natural. As far as he was concerned, a distinction had "necessarily to be drawn between rights which are justiciable and rights which are merely intended as a guide and directing objectives to state policy".[83] But Ayyar also felt, as he made clear in the proceedings of the Sub-Committee, that inclusion of unenforceable rights in a constitutional document was pointless.[84] It remains unclear whether the upshot of this was a recommendation that

[81] Nehru, *An Autobiography*, pp. 279-280.

[82] Mohandas K. Gandhi, Speech on Fundamental Rights, Karachi Congress, 31 March 1931, in *The Collected Works of Mahatma Gandhi* (Volume 45) (Government of India: Publications Division, 1971) 372, p. 372. See also Mohandas K. Gandhi, "What We Can Do Today", 30 July 1931, in in *The Collected Works of Mahatma Gandhi* (Volume 47) (Government of India: Publications Division, 1971) 235.

[83] Alladi Krishnaswami Ayyar, Note on Fundamental Rights, 14 March 1947, in *The Framing of India's Constitution: Select Documents* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 67, p. 67.

[84] Minutes of the Meetings of the Sub-Committee on Fundamental Rights, 27 February 1947, in *The Framing of India's Constitution* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 114, p. 115.

the Directive Principles be excluded altogether or that they be made enforceable, and Ayyar's disinclination towards including primary education as a justiciable right in a subsequent meeting of the Sub-Committee does not fully clarify matters.[85]

It is the notes by K. M. Munshi and K. T. Shah, two active and influential players in the constitution-making process, that offer more definite opinions. Munshi and Shah were ideologically dissimilar figures, veering towards the right and the left respectively, but both offered unambiguous objections to the unenforceable character of the Directive Principles. Munshi was skeptical of "mere precepts" and felt that "most of the general declarations found in national constitutions and international documents have proved ineffective to check the growing power of the modern state".[86] In India it was all the more likely that such declarations would be ignored: "general precepts which may be considered less than necessary by an advanced thinker on socialistic lines will not be looked at, much less understood, or applied in some parts of the country where feudal notions still are deeply engrained".[87] Munshi's comparative survey too encouraged him to support judicially enforceable rights. Even in Britain, where Parliament was sovereign, "prerogative writs have become part of the positive law to such an extent that the Parliament would never dream of overriding or abrogating them".[88] Although Munshi did not provide any specific example of a case where socio-economic rights had been

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[85] Minutes of the Meetings of the Sub-Committee on Fundamental Rights, 27 March 1947, in *The Framing of India's Constitution* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 124, p. 125.

[86] K. M. Munshi, Note and Draft Articles on Fundamental Rights, 17 March 1947, in *The Framing of India's Constitution* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 69, p. 69.

[87] Munshi, Note, Fundamental Rights, p. 69.

[88] Munshi, Note, Fundamental Rights, p. 70.

enforceable, he relied on rights-based instruments to make a broader claim about enforcement. "The existence of a legal right in the constitution must", he asserted, "necessarily imply a right in the individual to intervene in order to make the legal right effective".[89]

K. T. Shah put the matter in even stronger terms, fearing that non-justiciability would reduce the directive principles to "pious wishes".[90] The state would feel no pressure to deliver on the promise of these principles; their inclusion in the Constitution was a kind of "fraud" as there was no mechanism for their enforcement. The fact that the directive principles included social and economic goals, whose realization was a complex matter, was often taken to be an argument against justiciability. Shah turned this argument on its head. The very fact that "many rights in this category … may not be practicable all at once to give effect to" meant that the state could "avail themselves of every excuse to justify their own inactivity in the matter, indifference, or worse".[91] Alternatively, if the Constitution were to provide for the enforcement of such rights, "those responsible for giving effect to it would have to bestir themselves to find ways and means to give effect to it".[92]

In contrast to Munshi and Shah, whose views are clear, B. R. Ambedkar's thoughts on this matter have invited some controversy. A recent study has characterized

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[89] Munshi, Note, Fundamental Rights, p. 73.

[90] K. T. Shah, Note of Dissent, Sub-Committee on Fundamental Rights, 16 April 1947, in *The Framing of India's Constitution* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 191, p. 192. See also K. T. Shah, Comments on the Draft Report, Sub-Committee on Fundamental Rights, 10 April 1947, in *The Framing of India's Constitution* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 153.

[91] Shah, Dissent, Sub-Committee on Fundamental Rights, p. 192.

[92] Shah, Dissent, Sub-Committee on Fundamental Rights, p. 192.

Ambedkar's *Memorandum and Draft Articles on the Rights of States and Minorities* of 1947 as "the strongest articulation of social and economic rights".[93] The memorandum made an impassioned case for a socialist economic structure. Its message, it is posited, sits uneasily with Ambedkar's speech before the Constituent Assembly in November 1948. This thesis merits greater attention. Article II of the memorandum dealt with fundamental rights. The list of rights mentioned is wide-ranging, and Ambedkar made it clear that their judicial enforcement was guaranteed.[94] Equality before the law, access to public spaces, protection against unreasonable searches and seizures, and religious freedom all find a place. There is, however, no mention of a single socio-economic right. A different set of provisions outlined an economic philosophy structured around the state – "industries which are key industries or which may be declared to be key industries shall be owned or run by the state"; agriculture must be a state industry; the state was empowered to "determine how and when the debenture holder shall be entitled to claim cash payment", and so on. In an explanatory appendix to the memorandum, Ambedkar justified the inclusion of such provisions. He saw it as important "to put an obligation on the state to plan the economic life of the people on lines which would lead to the highest point of productivity without closing every avenue to private enterprise, and also provide for the equitable distribution of wealth".[95] India could rapidly industrialize only through

[93] Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Cambridge: Harvard University Press 2013), p. 148.

[94] B. R. Ambedkar, Memorandum and Draft Articles on the Rights and States of Minorities, 24 March 1947 in *The Framing of India's Constitution* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 84, pp. 97-98.

[95] Ambedkar, Memorandum, p. 99. This was, one may note, a commonly held view at the time.

some version of "state socialism".[96] The private sector lacked the capacity for major industrialization, and even if such industrialization were possible, it would come at the cost of wealth inequality.

Ambedkar proceeded to draw a relationship between his economic vision and rights. Rights were meaningless without certain background social and economic conditions:

> The fear of starvation, the fear of losing a house, the fear of losing savings, if any, the fear of being compelled to take children away from school, the fear of having to be a burden on public charity, the fear of having to be burned or buried at public cost are factors too strong to permit a man to stand out for his fundamental rights. The unemployed are thus compelled to relinquish their fundamental rights for the sake of securing the privilege to work and to subsist.[97]

Ambedkar rejected the standard practice where constitutional provisions were solely used to constrain state power, and positive actions like the protection of the poor were placed in the hands of the legislature. Legislatures, he noted, were vulnerable to both interest group capture and to political change. One needed to moderate the enthusiasm for parliamentary democracy, keeping in mind an "essential condition for the success of a planned economy is that it must not be liable to suspension or abandonment".[98] For constitutions to enable freedom in all of its forms, they needed to address both political liberty as well as the structure of economic life.

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[96] Ambedkar, Memorandum, p. 99.

[97] Ambedkar, Memorandum, p. 100.

[98] Ambedkar, Memorandum, p. 101.

This memorandum, as I have noted, is sought to be reconciled with Ambedkar's subsequent speech in the Constituent Assembly. Here, Ambedkar defended the directive principles, asserting that the Constitution "only provides a machinery for the government of the country. It is not a contrivance to install any particular party in power…".[99] Three possible reasons have been offered to explain Ambedkar's shift in position: his revisiting of the question through legal rather than political eyes; his effort to reconcile socialism with parliamentary sovereignty; and his strategic emphasis on other concerns like the rights of the lower castes.[100] Each of these explanations carries a degree of plausibility, but the shift in Ambedkar's position deserves interrogation.

Ambedkar's transition was not one wherein the support for enforceable socio-economic rights turned into support for unenforceable socio-economic rights. Even though it had been suggested that Ambedkar's memorandum "challenged constitutional lawyers to think differently about the possibility of incorporating social and economic rights",[101] at no point did he argue for enforceable socio-economic rights. The focus was instead on whether a constitution could be silent on the question of welfare and limit itself to the right to self-rule. To understand Ambedkar's position, our emphasis should not be on why the Directive Principles were not made enforceable in the same manner as the Fundamental Rights. The bulk of historical analysis has mistakenly focused on this inquiry.[102] It has tried to uncover why socio-economic rights allegedly went out of

[99] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 41.

[100] Jayal, *Citizenship and Its Discontents*, pp. 152-3.

[101] Jayal, *Citizenship and Its Discontents*, p. 151.

[102] The reason for this focus is no doubt partly shaped by contemporary debates on socio-economic rights. The recognition of such rights by constitutional documents, like the South African Constitution 1996, and

fashion and has presented reasons for the seemingly secondary status of the directive principles.[103] With regard to Ambedkar, the "puzzle" is made out to be that "he gave strong support to the project of incorporating such rights … [but subsequently] provided a reasoned defense of the eventual outcome without acknowledging that this implied any sort of withdrawal or retraction".[104] But the reason for the absence of any such acknowledgment is that there was no substantial change in Ambedkar's position. In fact, his original position continued to be a commonly held view. Barely months after India acquired Independence, the All India Congress Committee refused to rest on the achievement on political freedom and declared that "the establishment of real democracy … can only be realized when democracy extends from the political to the social and economic spheres".[105]

Rather than analyzing a dilution in standing that never occurred, we must ask what possible purpose the directive principles were meant to serve given their unenforceability. To ask the question crudely, what point did these principles have?[106]

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by constitutional courts, ranging from Colombia to India, has inspired an outpouring of literature on the possibility of justiciable socio-economic rights. Critical contributions in the current scholarship include Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (New York: Oxford University Press, 2000); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton, University Press, 2007); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (New York: Oxford University Press, 2008).

[103] Jayal, *Citizenship and Its Discontents*, pp. 154-8.

[104] Jayal, *Citizenship and Its Discontents*, p. 152.

[105] Resolutions adopted by the All India Congress Committee, 15-17 November 1947 in *INC: The Glorious Tradition* (Volume 4) (New Delhi: Indian Institute of Applied Political Research, A. M. Zaidi ed., 1987) 296, p. 303.

[106] Alon Harel has recently offered one answer to this question. He has argued that the inclusion of the directive principles rests on a republican conception of freedom (i.e., freedom as non-domination). Their recognition confirmed that India's Parliament was not sovereign and was limited in the exercise of its powers. See Alon Harel, *Why Law Matters* (New Delhi: Oxford University Press, 2014), pp. 158-168. But this suggestion does not seem entirely satisfactory, if only because the political goal to which it appeals had

The directive principles emerged out of reservations about the behavior of newly elected representatives. They arose from a worry over the outcomes that the use of legislative power would generate. The core of both Ambedkar's memorandum and his speech in November 1948 was an argument against constitutional silence on the subject of welfare. What is important about the speech in comparison with the earlier memorandum is the working out of the commitment to welfare. The speech is an effort to give this commitment institutional expression, and to negotiate its place with the simultaneous commitment to self-government. We may note that the pledge to welfare would also have to contend with the right to private property, as Ambedkar later acknowledged. The right might be diluted by later generations (as indeed it was), but for the moment the Constitution had rejected the state's "freedom to nationalize or socialize all private property without payment of compensation".[107]

Ambedkar's speech in November 1948 is not special because it offers us a rationale for the unenforceability of the directive principles. The Sub-Committee on Fundamental Rights already presented us with that. In explaining the choice, it made it clear that it was "as impossible for a worker to prove, as for a court to find, that a general right [such as the rights of workers to decent conditions] has been infringed in a given case".[108] Ambedkar himself, only a month after speech of November 1948, noted his

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already been achieved by the very fact of a written constitutional text that recognized the judicial review of legislation and separated power both vertically and horizontally.

[107] Speech by B. R. Ambedkar, Constituent Assembly of India, 25 November 1949, in *Constituent Assembly Debates* (Volume 11) (New Delhi: Lok Sabha Secretariat, 2009 [1950]) p. 975. The commitment to welfare would have to negotiate with rights more generally, of course. This was to become one of the most contentious issues in independent India's constitutional politics.

[108] Sub-Committee on Fundamental Rights, Letter to the Chairman, Advisory Committee on Minorities, Fundamental Rights etc., 3 April 1947, in *The Framing of India's Constitution* (Volume 2), (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 137, p. 137.

preference for using the language of rights for situations involving an enforceable remedy.[109] B. N. Rau too had regarded the distinction between the directive principles and fundamental rights as one between negative and positive rights, respectively, and found it "obvious that rights of the first type are normally not either capable of, or suitable for, enforcement by legal action, while those of the second type may be so enforced".[110] He pointed to both the Irish Constitution and H. Lauterpacht's 1945 text *An International Bill of the Rights of Man*, both of which had distinguished between negative and positive rights.[111]

The intervention in November 1948 matters for a different reason. It is here that Ambedkar gives us a positive account for the directive principles. It is at this moment that

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[109] Speech by B. R. Ambedkar, Constituent Assembly of India, 9 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 953.

[110] B. N. Rau, Notes on Fundamental Rights, 2 September 1946 in *The Framing of India's Constitution* (Volume 2), (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 21, p. 33.

[111] See Articles 40-45, Constitution of Ireland, 1945; H. Lauterpacht, *An International Bill of the Rights of Man* (New York: Oxford University Press, 2013 [1945]). Lauterpacht's 1945 work signaled a milestone in the international post-war recognition of rights. Lauterpacht offered a theoretical and historical framework for thinking about a bill of rights, a study of the relationship between the law of nature, natural rights, and the law of nations, as well as a carefully scripted model along the lines of which such a bill might be conceived. In Lauterpacht's draft law, a separation was drawn between two kinds of rights. (The model bill also contained a third part focused on enforcement.) The first part on rights contained familiar civil and political liberties; the second part included, though was not limited to, socio-economic rights. For example, Articles 13 and 14 of the model law spoke of the right to work, the right to education, etc., and of conditions of work respectively. To recognize such rights, Lauterpacht maintained, was to admit the "connection between political freedom and economic freedom, between legal equality and economic and social equality of opportunity" (p. 90). Lauterpacht did not perceive any difference in the relative importance of the rights in parts I and II of his draft. Indeed, both sets of rights were to be regarded as complementary to one another. Without the rights in part II, those in part I would "tend to become purely theoretical" (p. 134). Yet the protection of these rights was to be "different in form and less definite in degree" than part I rights (p. 134). Individual nations, Lauterpacht observed, taken different approaches towards part II rights, like the right to work. Despite variations in approaches, however, a general trend was discernable: such rights were typically framed as policy prescriptions to guide legislation. Lauterpacht wondered if such prescriptions were fitting as rules of international law in a context where such rules had been instantiated in a variety of ways and lacked a rule-like character within domestic legal regimes. To make such rights enforceable would be an attempt to undertake an endeavor at an international level which had not even been undertaken at a national level. Instead, it would be more suitable for such rights to not be judicially enforceable in a typical fashion but rather for them to be source of inspiration and pressure in other ways.

he articulates a reason for their codification. The directive principles mattered because, though the rules of democracy mandated that the people must choose those in power, they confirmed that "whoever captures power will not be free to do what he likes with it".[112] These principles, Ambedkar contended, were akin to the Instruments of Instructions under colonial legislation like the Government of India Act of 1935. The "only difference" between the two was that the principles were instructions to the legislature and executive rather than to the Governor-General and Governors.[113] The inclusion of such instructions in a Constitution was "to be welcomed", for when "there is a grant of power in general terms for peace, order, and good government, it is necessary that it should be accompanied by instructions regulating its exercise".[114] Even though the principles might lack "legal force" and those in power "may not have to answer for their breach in a court of law", they would "certainly have to answer for them before the electorate at election time".[115]

The analogy between the directive principles and the Instrument of Instructions is a telling one. Before the Simon Commission, Ambedkar had launched into a searing critique of the diarchy under the Government of India Act of 1919. The Instrument contributed greatly towards the reduction of ministries to non-entities. For example, the Instrument called on the Governors to safeguard the interests of civil servants. But this

[112] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 41.

[113] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 41.

[114] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 41.

[115] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 41.

instruction was interpreted widely, and the Governors "insisted that all matters relating to the services including the question of their appointments, posting, and promotions in the Minister's department should be under [their] charge".[116] For Ambedkar, history showed that the Instrument expanded the authority of those to whom it was directed. It was a mistake to regard the Instrument – as it would be a mistake to regard the directive principles – as meaningless.

One way to read Ambedkar's speeches in the Constituent Assembly is to see him as offering a democratic justification for the unenforceability of the directive principles.[117] But another is to see his interventions as arguing against the sufficiency of political democracy. Indeed, this sentiment had long been a feature of Ambedkar's thought. In a 1943 speech on the nineteenth century Congress leader and social activist Mahadev Govind Ranade, Ambedkar observed that the "formal framework of democracy is of no value and would indeed be a misfit if there was no social democracy".[118] Ambedkar's focus may have been somewhat different to Nehru's on this point, but the faith that egalitarianism extended beyond one man, one vote was shared by both. This was not simply a matter of principle. It was crucial to the survival of democracy. As Ambedkar noted on another occasion in the same year, the reason for democracy's collapse in Italy, Germany, and Russia and its survival in England and America was "a

[116] B. R. Ambedkar, Report on the Constitution of the Government of Bombay Presidency, 1929, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 2) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 315, p. 323.

[117] Jayal, *Citizenship and Its Discontents*, pp. 155-6.

[118] B. R. Ambedkar, "Ranade, Gandhi, and Jinnah", 18 January 1943, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 1) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 211, p. 222.

greater degree of economic and social democracy in the latter countries than it existed in the former".[119]

The speech on Ranade revealed a further facet of Ambedkar thinking: his emphasis on the effectiveness of rights. He challenged the "unwarranted assumption" that "once rights are enacted in a law then they are safeguarded", indicating that the limitations of political constitutionalism could not be resolved by legal constitutionalism.[120] Without the directive principles, legislators might be entirely at sea, and – more dangerously – exercise power without an overarching conception of socio-economic welfare. The codification of the directive principles would expose both the ruler and the ruled to the proper exercise of power. The pedagogical promise of the Constitution would thus be furthered, for directive principles would have, as Rau put it, "an educative value".[121]

IV

Rights, often found at the core of a liberal constitutional order, were only marginally in focus during the Indian nationalist movement. Gandhi's vision was arranged around duties rather than entitlements; the energy of those like Nehru was spent on the structure of economic life. In the decade or two preceding the end of alien rule, constitutional debates were almost invariably focused on the question of minorities and

[119] B. R. Ambedkar, "Labor and Parliamentary Democracy", 17 September 1943, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 10) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 106, p. 108.

[120] Ambedkar, "Ranade, Gandhi, and Jinnah", p. 222.

[121] Rau, Notes on Fundamental Rights, p. 34.

representation.[122] In spite of being sidelined during the public life of India's freedom struggle, however, rights did make an appearance in more than a few documents and resolutions. In 1918, a special session of the Indian National Congress called for equal treatment before the law, the right to bear arms, the freedom of the press, and so forth.[123] A year later, Motilal Nehru's Congress presidential address included the bold assertion that "no constitution can meet our needs unless it is accompanied with a guarantee and a clear declaration of our elementary rights…".[124] Civil rights found endorsement in subsequent Congress resolutions,[125] and the suppression of civil liberties were, in the same vein, condemned.[126]

At Karachi in 1931, the Congress went further and committed itself to a range of social and economic goals. For the younger Nehru, writing towards the end of the 1930s, it was a settled fact that "there are certain fundamental rights guaranteeing the freedom of the individual which we would like to ensure and to be incorporated in the constitution".[127] The list he populated included equal protection, religious liberty, and free expression. The Sapru Committee Report acknowledged that enforceable rights were

[122] This is vividly portrayed by the focus of the Sapru Committee. See *Constitutional Proposals of the Sapru Committee*.

[123] Resolutions adopted by the Special Session of the Indian National Congress, August 29-September 1, 1918, in *INC: The Glorious Tradition* (Volume 1) (A. M. Zaidi ed., New Delhi: Indian Institute of Applied Political Research, 1987) 407, p. 408.

[124] Jawaharlal Nehru, Report on the Brussels Congress, 19 February 1927 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 2) (S. Gopal ed., New Delhi: Orient Longman, 1972) 278, p. 290.

[125] Resolutions adopted by the Thirty-Fourth Session of the Indian National Congress, 27-29 December 1919 in *INC: The Glorious Tradition* (Volume 1) (A. M. Zaidi ed., New Delhi: Indian Institute of Applied Political Research, 1987) 431, pp. 436-437.

[126] Resolutions adopted by the Fiftieth Session of the Indian National Congress, 27-28 December 1936, in *INC: The Glorious Tradition* (Volume 3) (A. M. Zaidi ed., New Delhi: Indian Institute of Applied Political Research, 1987) 331, p. 339.

[127] Nehru, "On Federal Government", p. 601.

at odds with the British principle of parliamentary sovereignty, but felt that "the peculiar circumstances of India" made such rights "necessary not only for giving assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, government, and the courts".[128]

A rare moment which placed rights at the center of attention was V. S. Srinivasa Sastri's 1926 Kamala Lectures. Rights, Sastri contended, were distinguishable by three characteristics. First, they were "an arrangement, rule, or practice sanctioned by the law of the community and conducive to … the moral good of the citizen".[129] Second, they were guaranteed by law; that is to say, they were enforceable in a court of law and their violation would result in remedial action. Finally, no person had a monopoly on rights. They "must be open to all citizens".[130] Even though Britain had rejected the idea of a written constitution with a bill of rights, Sastri defended their codification. The textual recognition of rights served an instructive purpose. It was a reminder of the principles on which political action was to be based:

> In the distractions of public life, in the busy interactions and conflict of diverse interests, an uninstructed person, concerned only with his own minute aspect of affairs, is apt to forget, even if he knew the fundamentals of political action, the proprieties which may not be violated, the guarantees of justice and fair play which must never be brought into jeopardy.[131]

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[128] *Constitutional Proposals of the Sapru Committee*, p. 257.

[129] V. S. Srinivasa Sastri, Kamala Lectures, 1926, in *Speeches and Writings of the Right Honourable V. S. Srinivasa Sastri* (Volume 1) (Madras: Jupiter Press, 1969) 78, p. 89.

[130] Sastri, Kamala Lectures, p. 89.

[131] Sastri, Kamala Lectures, p. 95.

Rights did indeed appear in the Indian Constitution. But many of the rights that came to be recognized had a curious feature: they were explicitly limited or restricted in some fashion. To be sure, the thought that rights might be restricted was not new; it had been seen in texts like the 1928 Nehru Report.[132] However it was only during the making of the Constitution that this issue became an important question of drafting strategy. The question was not whether rights were absolute, but whether the grounds on which they were limited ought to be codified.

A number of participants in the Constituent Assembly saw such codification as a reflection of skepticism toward rights. One member put the matter directly when he observed that "many of [the] fundamental rights have been framed from the point of view of a police constable".[133] "[V]ery minimum rights", he argued, "have been conceded and those too very grudgingly and these so-called rights are almost invariably followed by a proviso".[134] The concern was that the limitations on rights would ultimately hinder the development of democratic norms. Free speech, for example, was central to the emergence of political opposition and public opinion. If India's founders "lay down fundamental rights and then insert provisions in every clause for taking away those rights", they would become "a laughing stock before the whole democratic world".[135]

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[132] See for example clause 4(iv), Report of the Committee of the All Parties Conference, 1928, p. 75: "The right of free expression of opinion, as well as the right to assemble peaceably and without arms, and to form associations or unions, is hereby guaranteed for purposes not opposed to public order or morality".

[133] Speech by Somnath Lahiri, Constituent Assembly of India, 29 April 1947, in *Constituent Assembly Debates* (Volume 3), p. 404.

[134] Speech by Somnath Lahiri, Constituent Assembly of India, 29 April 1947, in *Constituent Assembly Debates* (Volume 3), p. 404.

[135] Speech by Somnath Lahiri, Constituent Assembly of India, 29 April 1947, in *Constituent Assembly Debates* (Volume 3), p. 405.

A number of individuals shared this sentiment. K. T. Shah claimed that the attitude toward rights demonstrated a lack of faith in India's capacity for self-government. He criticized the Assembly for being "still unable to trust, in full, the people".[136] The codification of exceptions offered "verbal promise" rather than "any hope for actual performance".[137] "Almost in every case, in every clause, and in every sentence of each clause", he found that "the right given, conferred, or declared is either restricted, conditioned, or made dependent upon certain contingencies that may or may not happen".[138] Another member felt that "the freedom of assembling, freedom of the press, and other freedoms have been made so precarious and entirely left at the mercy of the legislature that the whole beauty and the charm has been taken away".[139] Such provisos would, many feared, limit judicial review. The courts would only be able to examine the bona fides of the legislature; the "actual provisions and the extent of the restrictions imposed would be out of the scope of judicial determination".[140] The "right will in practice", one member dreaded, "cease to be justiciable".[141] In effect, the provisos seemed to nullify the very purpose of recognizing the rights in the first place. As the

[136] Speech by K. T. Shah, Constituent Assembly of India, 17 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 619.

[137] Speech by K. T. Shah, Constituent Assembly of India, 17 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 620.

[138] Speech by K. T. Shah, Constituent Assembly of India, 17 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 620.

[139] Speech by Hukum Singh, Constituent Assembly of India, 1 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 732.

[140] Speech by Hukum Singh, Constituent Assembly of India, 1 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 733.

[141] Speech by Hirday Nath Kunzru, Constituent Assembly of India, 29 April 1947, in *Constituent Assembly Debates* (Volume 3), p. 401.

member Kazi Syed Karimuddin noted with respect to the restrictions on the right to peaceful assembly: "the very purpose of this fundamental right is being defeated".[142] Concerns such as these often turned to comparative approaches toward bills of rights. Karimuddin, for example, underlined the fact that the American Constitution had chosen a different textual approach. The Indian text indulged in a far greater degree of codification, whereas in the United States rights had "been entrusted to the judiciary".[143]

Those who supported the codification of restrictions saw matters differently. They felt it was a mistake to regard such codification as limiting the right in any special way. Codification was an effort at explication: it elaborated the concept underlying the right; it did not change the concept of the right. To show the necessity for such elaboration, defenders of codification too turned to the American experience. In the first stance, it was important to clarify the nature of this experience. It was an error, Ambedkar argued in November 1948, to regard rights under the United States Constitution as absolute. The difference between the American and Indian approach was simply "one of form and not of substance".[144] To substantiate this claim, Ambedkar turned to the free speech guarantee, the prized of all guarantees, and showed that even here American law had established limitations. He cited the United States Supreme Court's holding in *Gitlow v New York* (1925) that the right to free expression "does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestrained

[142] Speech by Kazi Syed Karimuddin, Constituent Assembly of India, 2 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 756.

[143] Speech by Kazi Syed Karimuddin, Constituent Assembly of India, 2 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 756.

[144] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 40.

and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom".[145]

Ambedkar's larger point was that rights had been limited in the United States by the Supreme Court's recognition of the state's inherent police power. The problem before India's founders was simple: there was no guarantee that the Indian judiciary would similarly recognize this power on behalf of the state. Drafting the rights in absolute terms would mean "depending on our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power".[146] By empowering the state directly to restrict rights, the same outcome had been achieved. "What one does directly, the other does indirectly. In both cases," he observed, "the fundamental rights are not absolute".[147]

One notices that the contest over rights was not a contest over the content of the individual rights themselves. For the most part, all parties agreed that rights were not absolute; they were necessarily limited. There was also no serious disagreement on the character of the specific restrictions. Instead, whereas critics of codification feared that placing these restrictions into writing would give the state more presumptive power than one might like, its defenders saw codification as a natural to the very guarantee of the right. In fact, the incorporation of restrictions might well enable more rather than less freedom, for it meant that the rights could only be limited on those grounds which had been explicitly recognized. The aim here was neither to enable nor limit the state. It was

[145] *Gitlow v New York*, 268 US 652 (1925), p. 666, cited in Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 40.

[146] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 41.

[147] Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 41.

to ensure that if a reasonable set of restrictions were available at hand, it was wiser to incorporate them rather than leave the matter open. In drawing the contours of a right, one was furthering the prospect that the particular right in question would be guaranteed, rather than opening to the door to the specification of the right by legislators and judges, who may well end up misunderstanding the concept at hand.

This fear of an open-ended constitutional text took place against the backdrop of a perceived failure of legal constitutionalism. There was "a danger", Alladi Krishnaswami Ayyar noted, "in leaving the courts, by judicial legislation so to speak, to read the necessary limitations, according to idiosyncrasies and prejudices it may be of individual judges".[148] In a later speech during a review of the draft constitution, Ayyar described the criticism towards codification as "entirely without foundation"[149]:

> The exceptions and qualifications introduced into the articles reproduce in statutory form the well-recognized exceptions and limitations on the fundamental rights dealt with in the article. Similar restrictions have been read by the Supreme Court into the United States Constitution which in general terms provides for these rights. Our Constitution, instead of leaving it to the courts to read the necessary limitations and exceptions, seeks to express in a compendious form the limitations and exceptions.[150]

The danger of giving courts the power to restrict rights was mapped out by B. N. Rau in 1946. In a careful note, Rau put forth a study of American constitutional doctrine

[148] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 8 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 336.

[149] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 23 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 837.

[150] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 23 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 837.

to demonstrate how judicial discretion had failed to provide clarity.[151] The equal protection guarantee afforded an example. In *Connolly v Union Sewer Pipe Company* (1902), the United States Supreme Court had refused to draw a distinction between trusts and combinations in agricultural products and live-stock and in other goods and commodities.[152] It held that both could be detrimental to the public interest, and therefore an anti-trust statute which exempted the former could not be upheld. But nearly four decades later, in *Tigner v Texas* (1940), the Court permitted a distinction between agriculture and other activities.[153] Rau sharply noted that "the same classes of persons that appeared to the courts in 1902 to be manifestly equal in fact were found in 1940 to be, in truth, unequal" and the Court's turn in *Tigner* revealed that the equal protection guarantee had "worn very thin".[154]

A reading of these cases suggests less judicial capriciousness than Rau's note indicates. In *Connolly*, an Illinois antitrust statute of 1893 was challenged as being repugnant to the American Constitution. A provision in the law rendered it inapplicable "to agricultural products or livestock while in the hands of the producer or raiser". The Court found no basis for this classification and upheld the challenge. It could see no reason for why "combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities" that dictated prices and harmed the public interest were to be blocked, without the suppression of "like combinations in respect of

[151] Rau, Notes on Fundamental Rights, pp. 21-36.

[152] 184 US 540 (1902).

[153] 310 US 141 (1940).

[154] Rau, Notes on Fundamental Rights, p. 24.

agricultural products and livestock" that similarly caused harm.[155] In *Tigner*, a Texas antitrust law that similarly exempted agricultural products and livestock was challenged by relying on the *Connolly* decision. On this occasion, the Court noticed an important shift in public policy towards agriculture in the interim period. Legislators, focusing on free market legislation, had come to see farmers differently from industrialists. In the four decades following *Connolly*, the Court found that the "states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the antitrust laws; have relieved their organizations for taxation."[156] These measures, which had been upheld, evidenced a legislative understanding that agriculture played a role that was different from other industries. The agricultural sector might pose threats and dangers, the Court noted, but such threats and dangers had been judged to be of a different nature. Given that the equal protection guarantee did not prohibit classification, *Tigner* chose to defer to elected representatives, declaring that "to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature".[157]

While *Connolly* and *Tigner* delivered somewhat different outcomes, as Rau noticed, underlying the varying levels of judicial scrutiny in both cases were varying degrees of leeway afforded to the legislature. In other words, the American approach towards codification failed to constrain or guide all relevant actors in a meaningful fashion. We see this concern in a second set of cases, involving graduated taxation

[155] *Connolly*, pp. 563-564.

[156] *Tigner*, p. 146.

[157] *Tigner*, p. 147.

measures, which Rau also studied. Here he noted that even though the United States Supreme Court upheld a graduated tax scheme in *Fox v Standard Oil Co. of New Jersey* (1935),[158] it invalidated a law that imposed a variable tax scheme barely a few months later in *Stewart Dry Goods v Lewis* (1935).[159] Further, five years later a tax statute that imposed differential rates depending on where one's money was deposited was upheld in *Madden v Kentucky* (1940).[160]

Yet again, these cases are more distinguishable than Rau's note implies. Though the Court did uphold a graduated tax scheme in *Fox*, it treated chain stores and separately-owned stores differently. The validity of this classification was central to the upholding of the impugned measure. In *Stewart Dry Goods*, by contrast, the variable tax measure taxed the sales of a merchant. A major reason why this measure failed is because of the complex relationship between sales and profits: an increase in sales need not indicate an increase in profits, and thereby need not reflect a greater capacity to pay. As the Court noted, a "merchant having a gross business of $1,000,000, but a net loss, must pay a greater tax than one who has a gross of $400,000, and realizes a substantial net profit".[161] While referencing *Fox*, the Court was careful to state that it had no objection to graduated taxation schemes per se. The problem was the classification in the instant case, which failed because the statute disregarded "the form of organization and method of conducting business".[162] As the Court put it,

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[158] 294 US 87 (1935).

[159] 294 US 550 (1935).

[160] 309 US 83 (1940).

[161] *Stewart Dry Goods*, p. 560.

[162] *Stewart Dry Goods*, pp. 565-566.

> The taxable class is retail merchants, whether individuals, partnerships or corporations; those who sell in one store or many; those who offer but one sort of goods and those who through departments deal in many lines of merchandise. The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions … It exacts from two persons different amounts for the privilege of doing exactly similar acts because one has performed the act oftener than the other.[163]

Similarly, in *Madden* the decision turned on the validity of the classification. A state law that imposed a differential rate of taxation depending on whether one's bank deposits were within the state or outside the state was upheld on the basis that tax collection imposed different burdens for accounts outside the state. Again, what we notice is not so much the instability of legal doctrine because of failed judicial reasoning but rather the inability of the rights clauses to provide what India's founders saw as sufficient guidance.

Rau's study taught him that blanket constitutional guarantees were too open-ended. The danger that he identified was not the danger of excessive, unrestrained judicial power. It was the danger of uncertainty. Textual precision was vital under a system that recognized judicial review, for the absence of limitations could be interpreted positively and courts may be seen as not having any power to develop the appropriate meaning of the right. As Rau noted elsewhere:

> It may be asked why we cannot trust our courts to impose any necessary limitations instead of specifying them in the constitution itself. The explanation is that, unlike the American Constitution, the draft constitution of India contains an article which in terms states that any law inconsistent with the fundamental rights conferred by the constitution shall

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[163] *Stewart Dry Goods*, p. 566.

> be void; unless, therefore, the constitution itself lays down precisely the qualifications subject to which the rights are conferred, the courts may be powerless in the matter.[164]

The standard approach in constitutional texts is to leave the limitations on rights unspecified. But we should see limitations not as violations but as determinations of the meaning of the right. By keeping rights as unspecified, they are left incomplete; their formulation is bequeathed to future political actors, who, in resolving the understanding of the right, continue the task of constitution-making.[165] In the Indian founding, we see the opposite approach: an effort to conclude the act of constitution-making by leaving as little as possible to be determined by future political actors. Giving courts broad powers of interpretation would, the Framers feared, provide direction to neither them nor legislatures. Put differently, it would mean not providing for any rights at all.

V

The power of courts would be shaped by another stark choice – the choice between procedural and substantive due process. The former gave judges the authority to review executive action and to see if such action fell within the boundaries of the applicable

[164] B. N. Rau, "The Indian Constitution", 15 August 1948, in B. N. Rau, *India's Constitution in the Making* (B. Shiva Rao ed., New Delhi: Orient Longmans, 1960), p. 364. The fear over uncertainty was also noticeable in matters that I have been unable to cover. A noteworthy example is executive power and federalism. See, for instance, Speech by T. T. Krishnamachari, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 1133: "It is conceivable that if we say nothing about the exercise of the executive powers in the concurrent list, the courts may interpret it one way or the other and the Constitution may become more federal or less federal as circumstances arise and the views of the judges in this regard and the decisions that they arrive at."

[165] This argument has been recently made with great force by Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (New York: Cambridge University Press 2009).

legislative enactment. Any deprivation of the right to life and personal liberty would, as per this standard, be assessed on the basis of the procedure required by the legislation. For example, a legislative enactment might require a warrant to conduct searches on one's property. A search without a warrant would violate the procedure specified in the law, and would therefore be an invalid application of the law. Substantive due process, however, went further. This standard gave judges the power to not simply scrutinize executive action by assessing its conformity to the concerned legislative measure, but to also evaluate the validity of legislative action itself. Procedural due process allowed review of the application of the law; the law that had been created could not, however, be called into question. In the case of substantive due process, this additional latter safeguard was put into place. One standard checked executive action against legislative sanction; the other imposed limits on even the legislature. The clause that was eventually chosen protected only procedural due process. A number of Constituent Assembly members, such as K. M. Munshi, saw this procedure as one with "no meaning at all".[166] For Munshi, the guarantee would be meaningful if courts had been empowered to "examine not merely that the conviction has been according to law or according to proper procedure, but that the procedure as well as the substantive part of the law are such as would be proper and justified by the circumstances of the case".[167]

Many felt that the choice that was made exhibited a preference for state power. Members sensitive to civil rights saw the rejection of substantive due process as "the

[166] Speech by K. M. Munshi, Constituent Assembly of India, 6 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 851.

[167] Speech by K. M. Munshi, Constituent Assembly of India, 6 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 851.

crown of our failures".[168] One participant sensed that the Constitution had taken away the presumption of innocence and made it "competent for the legislature to lay down a provision that in the matter of detention of persons whether for political or other reasons, the jurisdiction of the courts is ousted".[169] Another saw the result as supportive of preventive detention, and as meaning "that the legislature is all-powerful and whatever procedure is deemed proper under the circumstances will be binding upon the courts".[170]

It is true that substantive due process offered greater judicial right-based scrutiny than procedural due process. It would be a mistake, however, to suggest that the choice for the latter was borne out of statist concerns. Substantive due process had a controversial history in the United States.[171] It was a history which presented B. N. Rau cause for worry. Due process was recognized by the Fifth and Fourteenth Amendments to the American Constitution. Over time, the protection had shifted from being procedural to substantive in nature. For Rau, the phrase "due process of law" had become "synonymous with 'without just cause', the court being the judge of what is just cause".[172] This change, he feared, posed a problem for welfare legislation. Any progressive measure aimed at improving the collective good would involve some regulation of property rights and other liberties. With substantive due process, such laws

[168] Speech by Thakur Das Bhargava, Constituent Assembly of India, 15 September 1949, *Constituent Assembly Debates* (Volume 9), p. 1503.

[169] Speech by Mahboob Ali Baig Sahib Bahadur, 6 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 845.

[170] Speech by Z. H. Lari, 6 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 855.

[171] For a recent study that clarifies the principle of due process, see Nathan S. Chapman and Michael W. McConnell, "Due Process as Separation of Powers", 121 *Yale Law Journal* 1584 (2012).

[172] Rau, Notes on Fundamental Rights, p. 29.

would fall within the purview of judicial review; they would thereby become hostage to an individual judge's view on the matter. [173]

Rau's views were partly shaped by his visit to America. Justice Felix Frankfurter of the United Supreme Court had told him that substantive due process "is not only undemocratic (because it gives too few judges the power of vetoing legislation enacted by representatives of the nation) but also throws an unfair burden on the judiciary".[174] For Rau, the American experience indicated that law-making would be hard, because legislators would struggle to predict how courts would subsequently act. He was further concerned that enforceable rights, cast in "in general terms", would create "a vast mass of litigation about the validity of laws and at the same law that was held valid at one time may be held invalid at another or vice versa; the law will therefore become uncertain".[175] The problem would only grow worse as irremovable judges would be insensitive "to public needs in the social and economic sphere" in comparison with "the representatives of a periodically-elected legislative body", and would effectively "have a veto on legislation exercisable at any time at the instance of any litigant".[176]

The potential for substantive due process to adversely impact welfare legislation had been illustrated by American Supreme Court's decision in *Louisville Joint Stock Land Bank v Radford* (1935).[177] Rau noted that even though the Court had accepted

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[173] Rau, Notes on Fundamental Rights, p. 29.

[174] B. N. Rau, Report by the Constitutional Adviser on his visit to USA, Canada, Ireland, and England, October-December 1947, in *The Framing of India's Constitution: Select Documents* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 67, p. 67.

[175] Rau, Notes on Fundamental Rights, p. 31.

[176] Rau, Notes on Fundamental Rights, p. 31.

[177] 295 US 555 (1935).

certain propositions defending the impugned law, it found the taking of private property without just compensation to be dispositive, and the law was found to be unconstitutional.[178] To demonstrate that judicial uncertainty was a serious problem, Rau performed a study of labor legislation in the United States. He observed that while *Lochner* (1905) struck down a New York law that forbade work hours in excess of sixty per week or an average of more than ten hours per day in bakeries/confectionaries, twelve years later a ten-hour law for factories was upheld in *Bunting* (1917).[179] He located a similar story in the case of minimum wage legislation. *Adkins* (1923) had struck down a minimum wage for women and children, but in *West Coast Hotel* (1937) the fixing of minimum wages was found permissible.[180]

Yet again, these cases could have been placed in a different narrative. *West Coast Hotel* may have been read reassuringly, for it marked the Supreme Court's abandonment of substantive due process. After 1937 the doctrine was jettisoned, and a host of economic regulations were upheld in the years following the decision. As Justice Hugo Black stated some years later in *Ferguson* (1963), "we have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws".[181] It has been correctly pointed out that Rau's study draws on American Supreme Court decisions from

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[178] B. N. Rau, Notes on the Draft Report, 8 April 1947, in *The Framing of India's Constitution: Select Documents* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 151, p. 151.

[179] *Lochner v New York*, 198 US 45 (1905); *Bunting v Oregon*, 243 US 426 (1917).

[180] *Adkins v Children's Hospital of the District of Columbia*, 261 US 525 (1923); *West Coast v Parrish*, 300 US 379 (1937).

[181] *Ferguson v Skrupa*, 372 US 726 (1963), p. 731.

the early years of the twentieth century and omits later decisions.[182] Rau never mentioned the turn in American jurisprudence. This would have been strange except that – as in the case of codifying the limitations on rights – it was judicial uncertainty rather than judicial power which drove the decision towards procedural due process. Seen through this lens, the rejection of substantive due process only confirmed the fact of uncertainty. Its mentioning would have but strengthened Rau's point.

In the Constituent Assembly, Alladi Krishnaswamy Ayyar too emphasized America's troubling judicial record when it came to determining due process. "The United States Supreme Court", he argued, "has not adopted a consistent view at all and the decisions are conflicting".[183] To sample the spectacle, one only needed to

> take the index in the Law Reports Annotated Edition for fifteen years and compare the decisions of one year with the decisions of another year and he will come to the conclusion that it has no definite import. It all depended upon the particular judges that presided on the occasion. Justice Holmes took a view favorable to social control. There were other judges of a Tory complexion who took a strong view in favor of individual liberty and private property.[184]

Ayyar believed that it was wiser to jettison substantive due process rather than to allow judges to adapt American decisions "according to their conservative or radical instincts as the case may be".[185] He located a lack of consistency across due process jurisprudence.

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[182] Austin, *The Indian Constitution*, p. 110 n.12.

[183] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 6 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 853.

[184] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 6 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 853.

[185] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 15 September 1949, in *Constituent Assembly Debates* (Volume 9), p. 1537.

Ever since the American Supreme Court had incorporated substantive due process and reasonableness had become a matter of judicial determination, "a conflict was always noticeable between the police power of the State and the due process clause and the judicial decisions themselves were not uniform on the import of the due process clause".[186] In the process of "drawing the line between personal liberty and the need for social control", the Court had "created new limitations upon social control and has put new limitations upon personal liberty".[187]

Dissenters in the Constituent Assembly, who felt that procedural due process could "do great mischief in a country which is the storm center of political parties and where discipline is unknown", found little traction.[188] Each amendment that tried to replace the phrase "procedure established by law" with phrases such as "save in accordance with law" or "except in accordance with law" was rejected. It is tempting to see the choice between procedural and substantive due process as a choice between prioritizing welfare legislation and civil liberties respectively. But the case against substantive due process was not based on a more liberal view toward matters like preventive detention.[189] Instead, the Founders wondered if substantive due process would be fully intelligible to the legislature and judiciary. For Ambedkar, the due process debate was not one over preventive detention but rather one about the relationship between

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[186] Alladi Krishnaswami Ayyar, Speech in Advisory Committee proceedings, 21-22 April 1947, in *The Framing of India's Constitution: Select Documents* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966), p. 242.

[187] Ayyar, Fundamental Rights, p. 67.

[188] Speech by Kazi Syed Karimuddin, Constituent Assembly of India, 6 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 843.

[189] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 1 September 1949, in *Constituent Assembly Debates* (Volume 9), p. 852.

legislative and judicial power. It was about, that is to say, whom one could more reasonably trust:

> For myself I cannot altogether omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefore would not say anything.[190]

The risk was between substantive due process which might disallow welfare legislation through judicial overreach and procedural due process that might enable draconian criminal enactments through legislative hubris. What we find, as seen elsewhere, is the absence of any real debate over the nature of substantive and procedural due process per se – this was instead a debate about which how different institutions were likely to behave once they become empowered. The Assembly eventually chose procedural due process. But, interestingly enough, the dilemma that the Founders faced was partially resolved through further codification. Ambedkar came to feel that the Assembly, in prescribing that an arrest must simply conform to a procedure, "had not given sufficient attention to the safety and security of individual freedom".[191] Seeing the need for "compensation" for the choice to reject substantive due process, he introduced a new set of provisions that constitutionalized criminal law guarantees. Targeting arbitrary arrests,

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[190] Speech by B. R. Ambedkar, Constituent Assembly of India, 13 December 1948, in *Constituent Assembly Debates* (Volume 7), pp. 999-1001.

[191] Speech by B. R. Ambedkar, Constituent Assembly of India, 16 September 1949, in *Constituent Assembly Debates* (Volume 9), p. 1588.

Ambedkar felt that the new provision "saves a great deal which had been lost by the non-introduction of the words 'due process of law'".[192]

Together these various textual choices – from unenforceable socio-economic goals to limitation clauses alongside rights – were all attempts at directing the actions of popular representatives, law-applying officials, and the people. Codification by itself can carry a political community only so far. What ultimately determines the success of any constitutional project is not the creation of rules but their reception. The text of constitutional provisions, however settled they may be, will invariably need greater meaning supplied to them.[193] But even the enterprise of reception and assignment can only occur amidst some form of common knowledge. It is sometimes suggested that constitutional open-endedness is a virtue: it can reduce social conflict and avoid radical choices on contentious questions.[194] The case for incomplete theorizing places faith in the practices of popular decision-making, but such faith yet again is only possible in the presence of norms that inform such practices. It is only possible in the context of a normative universe, where rules exist and rules have meaning; where they guide behavior by the judgments they make possible.[195] Without this context, one simply cannot exercise the power to make decisions. Open-endedness, in other words, was not only a concern

[192] Speech by B. R. Ambedkar, Constituent Assembly of India, 15 September 1949, in *Constituent Assembly Debates* (Volume 9), p. 1500.

[193] See Gardner, "Can There Be a Written Constitution", pp. 187-194.

[194] See Cass R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996).

[195] The classic study of law and its normative construction still remains Robert M. Cover, "Foreword: *Nomos* and Narrative", 97 *Harvard Law Review* 4 (1983).

because it might lead to greater dependence on arbitrary will. More fundamentally, it would offer no possibility for the exercise of one's will.

In the final days of the Constituent Assembly, Ambedkar warned against the "grammar of anarchy".[196] To embrace constitutionalism was to subject disagreement to particular forms of decision-making and reasoning. The codification project explicated these forms. It was a way to make available the grammar of constitutionalism, to speak a new language with fresh meaning, and to de-politicize behavior in a manner that is not quite captured by crude debates over institutional power. The shared knowledge and understanding that a democratically-oriented polity would have reached was missing in India. There was no pre-commitment for the Constitution to record.[197] And without the rules of constitutional grammar, there could be no legitimization of conduct and no realization of freedom. It was impossible, say, to protect a right without some determinate understanding of what the right in question meant. Both codification and democratization were thus seen as linked, in the same way that a democracy cannot exist in the absence of general rules because this would not be a form of rule at all.[198] In India's context, the practices of democratic life had to be constituted and – as is an elementary point in the philosophy of language – our social practices are at least partly constituted by the vocabulary we employ. The consensus that would have been framed by a people with

[196] Speech by B. R. Ambedkar, Constituent Assembly of India, 25 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 978.

[197] On constitutions as pre-commitment devices, see Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995) at 134-177; Jeremy Waldron, "Pre-commitment and Disagreement" in *Constitutionalism: Philosophical Foundations* (Larry Alexander ed., Cambridge: Cambridge University Press, 1998) 271.

[198] See John Gardner, "How to Be a Good Judge", 32 *London Review of Books* 15 (2010), p. 15.

democratic sentiments had to be presumed – codification was an effort at supplying that consensus.

3

The Location of Power

I

A striking fact of the twentieth century was the triumph of the nation-state over competing institutional options.[1] The Indian state, with its centralized framework, is a crucial if neglected part of this story. The 1950 Constitution was, in a strict legal sense, federal in character. B. R. Ambedkar defended this characterization by noting the formal partitioning of power between the central and regional units.[2] Each authority had exclusive powers of legislation. Yet, even though Ambedkar minimized the Constitution's centralized apparatus, commentators at the time noticed that the text was not straightforwardly federal. K. C. Wheare, the Oxford scholar of government, for example, pointed to the lack of independent political identity granted to the regional units. These parts could be territorially altered without their consent; Parliament was empowered to create new entities and abolish existing ones.[3] Given these and other features, like the emergency provisions, Wheare struggled to term the text as federal. He instead referred to it as "quasi-federal".[4] C. H. Alexandrowicz, a prominent international

[1] For recent contributions on this theme, see Frederick Cooper, *Citizenship between Empire and Nation: Remaking France and French Africa, 1945–1960* (Princeton: Princeton University Press, 2014); Gary Wilder, *Freedom Time: Negritude, Decolonization, and the Future of the World* (Durham: Duke University Press, 2015).

[2] Speech by B. R. Ambedkar, Constituent Assembly of India, 25 November 1949, in *Constituent Assembly Debates* (Volume 11) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), pp. 976-977.

[3] See Article 3, Constitution of India, 1950.

[4] K. C. Wheare, *Federal Government* (4th edition, London: Oxford University Press, 1963), p. 28.

law theorist, similarly felt that India's federal model was difficult to define.[5] He rejected Wheare's characterization as being unhelpful, and preferred a distinction between contractual and administrative federations. In contrast to familiar federal arrangements, India did not witness sovereign units coming together to form a new political identity. No region of British India had, after all, been sovereign. The territory was populated by princely states, governed with varying degrees of internal autonomy on the basis of treaties with the British, and by provinces, which the colonial state directly administered. By way of a different reading of the Constitution's provisions, Alexandrowicz did find some meaning in seeing India as federal but acknowledged that the text was *sui generis*. The document was, in his words, "a constitution imposed from above".[6]

Working under the framework of the Cabinet Mission Plan of 1946 – a proposal that kept British India undivided, grouped provinces according to their religious composition, and limited the federal government's role to select national matters like foreign policy – the early sessions of the Constituent Assembly envisioned relatively powerful and autonomous regional units. These were the terms that the Plan had set. In coming to accept such conditions, the Assembly acknowledged the functional attractions of federalism. In the Assembly's inaugural session, for instance, one member drew on James Bryce's *The American Commonwealth* to stress the accommodative character of American federalism. Perhaps "in some such scheme, skillfully adapted to our own

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[5] C. H. Alexandrowicz, "Is India a Federation?", 3 *International and Comparative Law Quarterly* 393 (1954).

[6] Alexandrowicz, "Is India a Federation?", p. 403. The atypical character of Indian federalism was noticed a great many times during the proceedings of the Constituent Assembly. See, for example, the speech by G. L. Mehta, Constituent Assembly of India, 21 August 1947, in *Constituent Assembly Debates* (Volume 5) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), pp. 76-79.

requirements", he hoped, "a satisfactory solution may be found" to satisfy competing demands.[7] A weak center might also tempt the princely states and assist in their accession. Even though the Assembly never countenanced any form of government other than a republic, its initial meetings expressed the possibility of monarchical arrangements in these states. Jawaharlal Nehru, in relying on the sovereignty-government distinction, felt it was "quite possible that the people may like to have their *rajas*". [89] He found no "incongruity or impossibility about a certain definite form of administration in the states, provided there is complete freedom and responsible government there, and the people really are in-charge".[10] Other members likewise were willing to accept monarchy as long as it was rooted in popular consent.[11]

Some participants were more open in their opposition to regional autonomy. But they accepted the framework set out by the Cabinet Mission Plan in the hope that it would please the Muslim League and prevent the division of territory.[12] During these early days, Ambedkar candidly expressed disappointment at the absence of a strong

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[7] Speech by Sachchidananda Sinha, Constituent Assembly of India, 9 December 1946, in *Constituent Assembly Debates* (Volume 1) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 5, citing James Bryce, *The American Commonwealth* (Volume 1) (Indianapolis: Liberty Fund, 1995 [1914]), p. 14.

[8] Speech by Jawaharlal Nehru, Constituent Assembly of India, 13 December 1946, in *Constituent Assembly Debates* (Volume 1), p. 58.

[9] Speech by Jawaharlal Nehru, Constituent Assembly of India, 13 December 1946, in *Constituent Assembly Debates* (Volume 1) p. 58.

[10] Speech by Jawaharlal Nehru, Constituent Assembly of India, 13 December 1946, in *Constituent Assembly Debates* (Volume 1), p. 58.

[11] See the speeches by N. Gopalaswami Ayyangar, Constituent Assembly of India, 18 December 1946, in *Constituent Assembly Debates* (Volume 2) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), pp. 127-130; S. Radhakrishnan, Constituent Assembly of India, 20 January 1947, in *Constituent Assembly Debates* (Volume 2), pp. 271-272.

[12] See the speeches by Purushottam Das Tandon, Constituent Assembly of India, 13 December 1946, in *Constituent Assembly Debates* (Volume 1), p. 67; Shrikrishna Sinha, Constituent Assembly of India, 16 December 1946, in *Constituent Assembly Debates* (Volume 1), p. 89.

center. He felt that independent India required a central government that was even stronger than that envisioned in the Government of India Act of 1935.[13] It is clear that, for Ambedkar and others, support for local autonomy at this time was directly linked to the Plan. As one member observed:

> If a free vote is taken in this House or in the country, they will oppose residuary powers being vested in the provinces. But simply because we want to allay the fears of the Muslim League, imaginary or real, we respect their feeling and accepted that residuary powers shall vest in the provinces.[14]

It is no surprise, then, that all of this was to change with the Plan's failure and the subsequent partition of British India. The event liberated the Assembly from the framework under which it was operating. "I feel – thank God – that we got out of this bag at last", K. M. Munshi exclaimed.[15] We are, he cried, "free to form a federation of our choice, a federation with a Centre as strong as we can make it".[16] "We are relieved", said

[13] Speech by B. R. Ambedkar, Constituent Assembly of India, 17 December 1946, in *Constituent Assembly Debates* (Volume 1), p. 102. Even when Ambedkar argued for provincial autonomy during colonial rule, he was against any substantial weakening in central power. He regarded federations as fragile entities for their power rested on the power of their units. A federation was only as strong as its constituent parts. By contrast, Ambedkar wanted a central government "so independent that not only should it survive even when all provincial governments have vanished or changed into wholly different bodies but it should have the power to carry on provincial administration when a provincial government by rebellion or otherwise has ceased to function". B. R. Ambedkar, Report on the Constitution of the Government of Bombay Presidency, 1929, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 2) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 315, p. 385.

[14] Speech by R. K. Sidhwa, Constituent Assembly of India, 18 December 1946, in *Constituent Assembly Debates* (Volume 1), p. 117. In earlier decades too there were calls for local autonomy, but these were attempts toward greater Indian participation and increased self-government. See Resolutions adopted by the thirtieth session of the Indian National Congress, 27-29 December 1915, in *INC: The Glorious Tradition* (Volume 1) (A. M. Zaidi ed., New Delhi: Indian Institute of Applied Political Research, 1987), p. 376.

[15] Speech by K. M. Munshi, Constituent Assembly of India, 14 July 1947, in *Constituent Assembly Debates* (Volume 4) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 546.

[16] Speech by K. M. Munshi, Constituent Assembly of India, 14 July 1947, in *Constituent Assembly Debates* (Volume 4), p. 546.

another, "of the shackles which we had imposed on ourselves on account of the acceptance of the Cabinet Mission Plan".[17] Nehru put the matter in simple terms as Chairman of the Union Powers Committee:

> The severe limitation on the scope of central authority in the Cabinet Mission's plan was a compromise accepted by the Assembly much, we think, against its judgment of the administrative needs of the country, in order to accommodate the Muslim League. Now that partition is a settled fact, we are unanimously of the view that it would be injurious to the interests of the country to provide for a weak central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere.[18]

The Committee, Nehru proceeded to note, had chosen a federation with a strong center. Legislative power would be demarcated in three lists, following the 1935 Act, and residuary power would vest with the federal government. As these reflections confirm, the turn to centralization was not simply an immediate, sudden response to Partition. While it was indeed feared that a weak center might encourage the Balkanization of India and "lead to the establishment of innumerable Pakistans", the more significant outcome of Partition was that it freed the Assembly and allowed for a fresh debate on the federal question.[19]

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[17] Speech by N. Gopalaswami Ayyangar, Constituent Assembly of India, 20 August 1947, in *Constituent Assembly Debates* (Volume 5) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 38.

[18] Letter from Jawaharlal Nehru, Chairman of the Union Powers Committee, to President, Constituent Assembly of India, 5 July 1947, available in *Constituent Assembly Debates* (Volume 5), pp. 58-59.

[19] Speech by Brajeshwar Prasad, Constituent Assembly of India, 9 November 1948, in *Constituent Assembly Debates* (Volume 7) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 371.

This chapter unpacks the ideological commitment to a centralized state.[20] Such a state was seen as facilitating a distinct form of political mediation. It was not just an assay at a constitutional structure where the concentration of authority would prevent secession.[21] The existence of a state involved a turn to modernity – including the power dimension associated with modern institutions – and enabled a new kind of inter-subjectivity. Localism presented a different form of political mediation. Natives were seen as not having a politics. To liberate Indians from localism, to rescue them from villages and kings, was to offer them collective agency. The centralized state could mobilize allegiances, and thereby pave the way for a form of deliberation appropriate to the modern world. The centralized state would be a vehicle for development and industrialization; it was the state that could avert capitalist exploitation and undertake modernization. The state was an entity that would, in other words, reconstitute interpersonal relationships by placing all individuals under its aegis, and utilize this collective agency to provide for welfare. This conception of a centralized state emerged alongside an alternative local government tradition. Members of this tradition, most notably Mohandas Gandhi, possessed views that were often radically different. The

[20] Uday Singh Mehta's recent work has rightly underlined the Founding commitment to a strong state. See Uday Singh Mehta, "Constitutionalism" in *The Oxford Companion to Politics in India* (Niraja Gopal Jayal and Pratap Bhanu Mehta eds., New Delhi: Oxford University Press, 2010) 15; Uday Singh Mehta, "Indian Constitutionalism: Crisis, Unity, and History" in *The Oxford Handbook of the Indian Constitution* (Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta eds., Oxford: Oxford University Press, 2016) 38. My account is different in important ways, not least of all because I take the choice to have occurred alongside crucial constraints on state power. Mehta's work says very little about the motivations behind the centrality of the state. For studies that interrogate the statist commitment, see Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (London: Zed Books, 1986); *The Enchantment of Democracy and India* (Ranikhet: Permanent Black, 2011).

[21] This standard way of understanding centralization would see it as similar to the choice for parliamentary over presidential government, which was sometimes defended on the ground that it would enable harmonious legislative-executive relations and prevent institutional conflict in a new democracy. For this defense of parliamentarianism, see the speech by Alladi Krishnaswami Ayyar, Constituent Assembly Debates, 10 December 1948, in *Constituent Assembly Debates* (Volume 7), pp. 985-986.

variance in outlook ranged over issues such as the instincts in Indian society, the locus of social change, the meaning of political participation, and the relationship between modernity and freedom. It was a variance that rested, in fundamental way, on contrasting notions of the state and society. A study of the local government tradition matters because it shows that the nation-state was not the only imagined anti-colonial outcome.[22] It is also important because the rejection of this tradition reveals the premises behind the choice to centralize.

II

In the early years of the twentieth century, Indian political thought experienced a shift in emphasis. The predominant intellectual inquiry of the previous century – namely the reasons for why India had fallen to foreign rulers – faded away. In this nineteenth century, this inquiry had motivated Indians to examine their social practices, and such inquiries were characteristic of what is sometimes called the Indian Renaissance.[23] As we have noted, time saw a shift in attention toward a more forward-looking set of concerns that were centered on the meaning of independence and the means for its achievement. Mohandas Gandhi's 1909 tract, *Hind Swaraj* (Indian Home Rule), marked a crucial moment in this transition. While the text considered the colonization of India – chapter

[22] See Karuna Mantena, "Popular sovereignty and anti-colonialism", in Richard Bourke and Quentin Skinner (eds.), *Popular Sovereignty in Historical Perspective* (Cambridge: Cambridge University Press, 2016) 297, pp. 297-301. On other colonial visions of the future, see Manu Goswami, "Imaginary Futures and Colonial Internationalisms", 117 *American Historical Review* 1461 (2012).

[23] It should not be assumed that such an inward-looking investigation is a necessary part of the colonial experience. See Aung San Suu Kyi, "Intellectual Life in Burma and India under Colonialism" in *Freedom from Fear and Other Writings* (Michael Aris ed., London: Penguin Books, 2010) 82, pp. 83-100.

VII was titled "Why was India lost?" – its emphasis was on liberation. In *Hind Swaraj*, Gandhi alleged that Indians were "impatient to obtain *Swaraj*, but … certainly not decided as to what it is".[24] Enthusiasm was built around ridding India of foreign rule, without reflection on the outcome this hoped to achieve. To desire the same form of government with different personnel, to seek similar models of statehood with more participation, was to pursue "English rule without the Englishman".[25] This would be wanting "the tiger's nature, but not the tiger".[26] For Gandhi, this would merely result in a new form of confinement. Such a vision of *swaraj*, he argued, "is not truly *swaraj*".[27]

Gandhi's defense of this claim rested on critique of Western political institutions. He began by considering their efficacy. The British Parliament was branded as "a sterile woman and a prostitute".[28] Its "natural condition" was "such, that, without outside pressure, it can do nothing".[29] It was "like a prostitute because it is under the condition of ministers who change from time to time".[30] Gandhi could locate no institutional reason for Parliament's failures. Legislators worked without a salary to maintain commitment to the public good; a broad level of literacy existed among the voters. Given these factors, Parliament should in theory be effective. And yet, Gandhi observed, "it is generally

[24] Mohandas K. Gandhi, *Hind Swaraj*, in *Hind Swaraj and Other Writings* (Anthony J. Parel, Cambridge: Cambridge University Press, 1997 [1909]), p. 26.

[25] Gandhi, *Hind Swaraj*, p. 28.

[26] Gandhi, *Hind Swaraj*, p. 28.

[27] Gandhi, *Hind Swaraj*, p. 29.

[28] Gandhi, *Hind Swaraj*, p. 30.

[29] Gandhi, *Hind Swaraj*, p. 30.

[30] Gandhi, *Hind Swaraj*, p. 30.

acknowledged that the members are hypocritical and selfish".[31] They vote on party lines without independent thought, their decisions lack finality, and the institution remains riddled with indiscipline. The Prime Minister is invested in entrenching his own power rather than in furthering public welfare. Political leaders under such a system may not commit acts of bribery but they were "open to subtler influences".[32]

Cataloguing these institutional failures paved the way to a wholesale attack on Western civilization. Gandhi emphasized, for instance, the privileging of physical comfort, of making "bodily welfare the object of life".[33] This point was borne out by numerous illustrations – the improvement in homes and conditions of living, the change in clothing from skins to modern apparel like trousers, the replacement of manual labor by machines, the birth of the steam-engine, and so on. Civilization was the story of progress along such lines; it was a continual improvement in our worldly condition. As newer changes would occur, say our capacity to travel across the world in only a few hours, men would eventually not even require their limbs. Gandhi saw such changes as exemplifying newer forms of bondage. "Formerly", he observed, "men were made slaves under physical compulsion, now they are enslaved by temptation of money and of the luxuries that money can buy".[34]

Hind Swaraj offered many reasons against such worldliness. To begin with, alleged progress in civilization was merely the delivery of symptomatic remedies. Diseases emerged that had never previously existed, but victory was seen as an increase

[31] Gandhi, *Hind Swaraj*, p. 31.

[32] Gandhi, *Hind Swaraj*, p. 32.

[33] Gandhi, *Hind Swaraj*, p. 35.

[34] Gandhi, *Hind Swaraj*, p. 36.

in medical care rather than as the absence of such conditions. The test of civilization was not a decrease in desires, but the satisfaction of wants as they grew. Alleged improvements were not solutions to our problems – they were not *improvements* at all but were instead a deepening of the problem. Civilization, in other words, failed on its own terms: "Civilization seeks to increase bodily comforts, and it fails miserably even in doing so".[35] This attack was linked to civilization's indifference towards morality and religion, though *Hind Swaraj* did not expand on either term. Gandhi did clarify his use of "religion" as being associated with no particular form of organized religion and as relating to "that religion which underlies all religions".[36] He wanted to focus on the mental and physical unrest that civilization had engendered: People in the civilized world "appear to be half mad", they are without "real physical strength or courage", their energy is sustained by "intoxication", and they cannot "be happy in solitude".[37] Civilization, to state the matter plainly, cared too little about the mastery of the self.

For Gandhi, there existed a natural link between the modern state and imperial rule. He explored this relationship in two respects. The first was on behalf of Indians themselves. The British, Gandhi argued, had not "taken India"; Indians had "given it to them".[38] The introduction of foreign rule and its continuance had only been made possible by domestic consent. The succumbing to foreign rule, as it were, occurred because of material desires. Indians welcomed the East India Company in the hope that they would acquire sudden wealth. Their internal conflicts were motivated by a search for

[35] Gandhi, *Hind Swaraj*, p. 37.

[36] Gandhi, *Hind Swaraj*, p. 42.

[37] Gandhi, *Hind Swaraj*, p. 37.

[38] Gandhi, *Hind Swaraj*, p. 39.

wealth and power but such conflicts only served to give the Company more control. He compared Indians to addicts. The person encouraging the addiction may carry some responsibility, but it was ultimately the addict who was to the blame for his condition.

Secondly, it was the imperatives of modern civilization that had led the British to colonize India. Their singular motivation was commerce. Seeing colonialism as a consequence of modern civilization presented the British in an interesting light. They were no longer uncomplicated oppressors, as much of Indian nationalism had suggested, but instead victims of modernity. In the preface to *Hind Swaraj*, Gandhi registered his surprise as the banning of the text. He saw it less as an attack on the British government, for which a ban may have made sense, and more as a defense of ancient forms of social ordering. He regarded the Indian belief that "they should adopt modern civilization and modern methods of violence to drive out the English" as "a suicidal policy", and instead called on Indians to "revert to their own glorious civilization".[39] In the first chapter of the text, Gandhi defended figures like Dadabhai Naoroji and Gopal Krishna Gokhale, both prominent nationalists who fought for Indian causes but had close links with the British. Gandhi argued that their proximity to the Raj should not reduce their historical stature. Here again, the underlying impulse was the same. The colonizers were not per se the enemy. Colonialism did not occur because of "any peculiar fault of the English people".[40] India's foreign rulers were so deeply seduced by modern civilization that they "deserve

[39] Gandhi, *Hind Swaraj*, p. 7.

[40] Gandhi, *Hind Swaraj*, p. 33.

our sympathy".[41] Thus, the link between imperialism and the modern state was drawn to show that the rejection of the former must involve a rejection of the latter.[42]

Gandhi saw *Hind Swaraj* as capturing a set of universal truths. Its argument was not uniquely applicable to Indians. The crisis of Western institutions was, after all, a crisis being experienced in the West. As sources of inspiration, Gandhi listed a disparate set of Western thinkers, and the preface to the text mentioned Emerson, Ruskin, Thoreau, and Tolstoy as writers he had "endeavored humbly to follow".[43] His message, he claimed, was widely held not only "by many Indians not touched by what is known as civilization" but also "by thousands of Europeans".[44] His remarks often rested on Western shoulders; his attack on Parliament, for example, had already been voiced by "great English thinkers".[45]

The study of civilization in Chapter VI of *Hind Swaraj* commenced with a reference to Edward Carpenter's *Civilization: Its Cause and Cure*.[46] Carpenter had perceived the pessimism surrounding civilization; the lurking feeling that it may be "some kind of disease that the various races of man have to pass through".[47] Civilization was a historical phase littered with troubling features. In our physical life, medicine had

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[41] Gandhi, *Hind Swaraj*, p. 38.

[42] For a careful analysis of the conceptual relationship between anti-colonialism and anti-statism, see Karuna Mantena, "On Gandhi's Critique of the State: Sources, Contexts, Conjectures", 9 *Modern Intellectual History* 535 (2012).

[43] Gandhi, *Hind Swaraj*, p. 6.

[44] Gandhi, *Hind Swaraj*, pp. 10-11.

[45] Gandhi, *Hind Swaraj*, p. 31.

[46] Gandhi, *Hind Swaraj*, p. 34.

[47] Edward Carpenter, *Civilization: Its Cause and Cure, and Other Essays* (London: Swan Sonnenschein, 1891), p. 1.

advanced alongside rising ill-health and an increase in doctors. In society, individuals were involved in endless competition, classes were embattled in conflict, and the success of one came at the cost of another. Our mental health spoke of a similar story. Carpenter was concerned not by the growth in asylums but by the "strange sense of mental unrest which marks our populations".[48] Individuals were overwhelmed by internal conflicts, a striking departure from the "naïve insouciance of the pagan and primitive world".[49] Each of these domains – the mind, the body, and society – were without harmony. Disease, for him, marked the absence of unity. In the pre-modern world, health had been understood positively. But modern times had seen in purely negative terms. It was understood as the absence of a condition rather than a form of positive anchoring. Carpenter regarded private property as bearing ultimate responsibility for these changes; the institution had fundamentally altered the ordering of society. In *Civilization: Its Cause and Cure*, a different world was imagined in poetic, nostalgic terms; a world marked by leisure, natural beauty, and a sense of community. It was a world without modern institutions of government. The very need for government was, after all, "evidence in social life that man has lost his inner and central control and therefore must resort to an outward one".[50]

The idea of the state as an external figure animated much of Gandhi's thought. He saw it as a foreign body attempting to mediate social relationships, thereby powerfully likening it to another form of alien rule. He believed that internal tensions should find

[48] Carpenter, *Civilization*, p. 3.

[49] Carpenter, *Civilization*, p. 3.

[50] Carpenter, *Civilization*, p. 31.

their own resolution, and that such resolution was indeed possible. His understanding of Hindu-Muslim conflict in *Hind Swaraj* recorded this belief:

> I do not suggest that the Hindus and Mahomedans will never fight. Two brothers living together often do so. We shall sometimes have our heads broken. Such a thing ought not to be necessary, but all men are not equi-minded. When people are in a rage, they do many foolish things. These we have to put up with. But, when we do quarrel, we certainly do not want to engage counsel and to resort to English or any other law courts. Two men fight; both have their heads broken, or one only. How shall a third party distribute justice amongst them? Those who might may expect to be injured.[51]

Gandhi employed the external-internal lens in contexts ranging from foreign rule to local political institutions to modern professions. Lawyers, for instance, "advance quarrels, instead of repressing them"[52] They only cause and further social conflict, and in the process advance their own material well-being. In the case of doctors, medicines are prescribed to remedy "negligence or indulgence" but such treatment only legitimizes the condition.[53] The upshot of this was the absence of freedom: "A continuance of a course of medicine must … result in loss of control over the mind".[54] Such modern devices had, in the ultimate analysis, made humans live as if they were different beings. Machinery, in particular, had created social divisions. Take the railways, for example, which had prevented a shared living experience under the British: "It was after the advent of

[51] Gandhi, *Hind Swaraj*, p. 57.

[52] Gandhi, *Hind Swaraj*, p. 59.

[53] Gandhi, *Hind Swaraj*, p. 63.

[54] Gandhi, *Hind Swaraj*, p. 63.

railways that we began to believe in distinctions".[55] Gandhi's emphasis here was on the *unnatural* way of being that modernity involved. Our body parts were meant to limit our physical movements, and the railways illustrated an attempt to reject these natural limitations. It was a belief in external solutions which had enabled British rule, and a belief in Western political institutions would be a mistake of the same kind. The only way for genuine self-rule was to resist all outside authority. The alternative world in *Hind Swaraj* recalled a life with villages, handlooms, manual labor, limited professionals, agricultural practices, and, above all, no machinery – that "the chief symbol of modern civilization".[56] Such forms of living had their shortcomings, of course, but such shortcomings would not be internal to the system.

Gandhi's interest in India's pre-modern institutions was apparent from his earliest writings. In petitions to secure the rights of Indians in South Africa, he drew on Henry Maine to underline India's long history with institutions of governance.[57] The idea of representation, he asserted, was one that Indians had grasped since ancient times.[58] The place of the panchayat was similarly affirmed. It was a body that "guides all the actions of an Indian".[59] Gandhi viewed Maine's powerful descriptions as far from fanciful. In

[55] Gandhi, *Hind Swaraj*, p. 49.

[56] Gandhi, *Hind Swaraj*, p. 107.

[57] See the petition to the Natal Legislative Assembly, 28 June 1894, in *The Collected Works of Mahatma Gandhi* (Volume 1) (Government of India: Publications Division, 1979) 128. On Gandhi's early efforts in South Africa, see Ramachandra Guha, *Gandhi Before India* (New Delhi: Allen Lane, 2013), pp. 55-81. For Maine's analysis of Indian village see, see Henry Sumner Maine, *Village-Communities in the East and West* (London: John Murray, 1871).

[58] Mohandas K. Gandhi, "The Indian Franchise", 16 December 1895, in *The Collected Works of Mahatma Gandhi* (Volume 1) (Government of India: Publications Division, 1979) 266, pp. 269-270.

[59] Gandhi, "The Indian Franchise", pp. 269-270.

1905, he considered administrative reforms that the economist R. C. Dutt was bringing to the State of Baroda. Dutt's proposals for decentralization, Gandhi noted, "endowed the villages with control of their own management and has given certain powers to the headman, revived the village school-master, and upon the old system he has engrafted real elective representation".[60] If South African readers studied the Baroda experiment, they might come to acknowledge the seriousness of such possibilities.[61]

This admiration for the past came alongside fierce criticism of the present. The turn away from agriculture, the rejection of rural life, the devotion to modern science, etc., were all sources of worry. Gandhi feared that Indians, in their "impatience of English rule", will simply "replace one evil by another and worse".[62] He dreaded the day when India would go through "the process of civilization", imitating the "gun factories and hateful industrialism" that had "reduced the people of Europe to a state of slavery and all but stifled among them the best instincts".[63] As we have seen, this critique of modern civilization found its most powerful articulation in *Hind Swaraj*. In the years following the publication of this tract, Gandhi often returned to its themes and reiterated his convictions, with a more focused reappraisal of village life.[64] The people of Europe,

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[60] Mohandas K. Gandhi, "Baroda: A Model Indian State", 3 June 1905, in *The Collected Works of Mahatma Gandhi* (Volume 4) (Government of India: Publications Division, 1960) 456, p. 457.

[61] Gandhi, "Baroda: A Model Indian State", p. 457.

[62] Mohandas K. Gandhi, Preface to Leo Tolstoy's "Letter to a Hindoo", 19 November 1909, in *The Collected Works of Mahatma Gandhi* (Volume 10) (Government of India: Publications Division, 1966) 3, p. 4.

[63] Gandhi, Preface to Leo Tolstoy's "Letter to a Hindoo", p. 4.

[64] See, for example, Mohandas K. Gandhi, "Village Industries", 15 November 1934, in *The Collected Works of Mahatma Gandhi* (Volume 59) (Government of India: Publications Division, 1974) 255; Mohandas K. Gandhi, Speech at Gandhi Seva Sangh, 30 November 1934, in *The Collected Works of Mahatma Gandhi* (Volume 59) (Government of India: Publications Division, 1974) 408; Mohandas K.

he remarked, had no political power. They had no real freedom; no *swaraj*.[65] In 1945, he wrote to Nehru affirming the model of governance outlined in *Hind Swaraj*:

> I believe that if India, and through India the world, is to achieve real freedom, then sooner or later we shall have to go and live in the villages – in huts, not in palaces. Millions of people can never live in cities and palaces in comfort and peace. Nor can they do so by killing one another, that is, by restoring to violence and untruth. I have not the slightest doubt that, but for the pair, truth and non-violence, mankind will be doomed. We can have the vision of that truth and non-violence only in the simplicity of the villages. That simplicity resides in the spinning-wheel and what is implied by the spinning-wheel. It does not frighten me at all that the world seems to be going in the opposite direction.[66]

In his account of bottom-up constitutionalism, each village was to obtain autonomy in its own affairs. He sketched the following, somewhat fantastic image:

> In this structure composed of innumerable villages, there will be ever-widening, never-ascending circles. Life will not be a pyramid with the apex sustained by the bottom. But it will be an oceanic circle whose center will be the individual always ready to perish for the village, the latter ready to perish for the circle of villages, till at last the whole becomes one life composed of individuals, never aggressive in their arrogance but ever

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Gandhi, Letter to Jhaverbhai Patel, 23 August 1944, in *The Collected Works of Mahatma Gandhi* (Volume 78) (Government of India: Publications Division, 1979) 45; Mohandas K. Gandhi, "How to Improve Village Industries", 21 May 1945, in *The Collected Works of Mahatma Gandhi* (Volume 80) (Government of India: Publications Division, 1980) 152; Mohandas K. Gandhi, Speech at Industries Ministers Conference, 31 July 1946, in *The Collected Works of Mahatma Gandhi* (Volume 85) (Government of India: Publications Division, 1982) 95; Mohandas K. Gandhi, "Decentralization", 15 October 1946, in *The Collected Works of Mahatma Gandhi* (Volume 85) (Government of India: Publications Division, 1982) 459.

[65] Mohandas K. Gandhi, "What of the West?", 3 September 1925, in *The Collected Works of Mahatma Gandhi* (Volume 28) (Government of India: Publications Division, 1968) 147.

[66] Mohandas K. Gandhi, Letter to Jawaharlal Nehru, 5 October 1945, in *The Collected Works of Mahatma Gandhi* (Volume 81) (Government of India: Publications Division, 1980) 319, p. 319.

> humble, sharing the majesty of the oceanic circle of which they are integral units.[67]

This harmonious universe would rely on consent rather than coercion. Panchayats, as he conceived of them, would not impose their authority on others. Instead, the undertaking of public functions and "constructive work" would organically invite respect.[68] This form of democracy lacked the violence associated with centralized, representative alternatives.[69] Such alternatives were, for him, impossible to maintain without the use of force.

During these years, Gandhi was far from alone in his attack on the modern state. As scholars have recently reminded us, a major figure in this intellectual tradition was the economist and sociologist Radhakamal Mukerjee.[70] In 1916, Mukerjee published a study of the Indian rural economy. He critiqued Western industrialism for its obsession with the division of labor, its difference towards community bonds, and its rejection of transcendentalism. The Indian village community offered a different, self-contained image:

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[67] Mohandas K. Gandhi, "Independence", 21 July 1946, in *The Collected Works of Mahatma Gandhi* (Volume 85) (Government of India: Publications Division, 1982) 32, p. 33.

[68] Mohandas K. Gandhi, "Panchayats", 28 May 1931, in *The Collected Works of Mahatma Gandhi* (Volume 46) (Government of India: Publications Division, 1971) 239, p. 240.

[69] Mohandas K. Gandhi, "Democracy and Non-Violence", 13 May 1940, in *The Collected Works of Mahatma Gandhi* (Volume 72) (Government of India: Publications Division, 1978) 60. On the relationship between democratic politics and violence in Gandhi's thought, see Uday Singh Mehta, "Gandhi on Democracy, Politics, and the Ethics of Everyday Life", 7 *Modern Intellectual History* 355 (2010).

[70] See Mantena, "On Gandhi's Critique of the State: Sources, Contexts, Conjunctures".

> The village is still almost self-sufficing, and is in itself an economic unit. The village agriculturist grows all the food necessary for the inhabitants of the village. The smith makes the ploughshares for the cultivator, and the few iron utensils required for the household. He supplies these to the people, but does not get money in return. He is recompensed by mutual services from his fellow villagers. The potter supplies him with pots, the weaver with cloth, and the oilman with oil. From the cultivator each of these artisans receives his traditional share of grain. Thus almost all the economic transactions are carried on without the use of money ... village communities are the most complete and the most contented in the world. Within their self-sufficing confines trade is no vulgar source of profit for which men scheme and thrive, but a calling, often a holy calling, handed down from father to son through generations, each with its own unchanging ideals, its zealously-guarded crafts.[71]

In subsequent years, Mukerjee developed these themes into an ambitious study of organization beyond the modern centralized state.[72] This new work, titled *Democracies of the East*, was motivated by lessons from the West. The First World War had revealed the moral shortcomings of the modern statist vision; economic conflicts could no longer be captured by simplistic sovereignty-based accounts. The importance of regional autonomy, administrative decentralization, and group life were increasingly being acknowledged. But Mukerjee was less interested in the reshaping of Western political thought and more invested in the implications that these developments had for India's future. He feared the cementing of Western laws on Indian soil; that is to say, the indifference toward local conditions. The problem of ethnicity, for instance, had no resolution within Western institutions. "The solution for the poly-ethnic masses of

[71] Radhakamal Mukerjee, *The Foundations of Indian Economics* (London: Longmans, Green and Co., 1916), pp. 3-4. On Gandhian economic thought and the contribution of the thinker J. C. Kumarappa, see Benjamin Zachariah, *Developing India: An Intellectual and Social History* (New Delhi: Oxford University Press, 2005) at 156-210; Venu Madhav Govindu and Deepak Malghan, *The Web of Freedom: J. C. Kumarappa and Gandhi's Struggle for Economic Justice* (New Delhi: Oxford University Press, 2016).

[72] Radhakamal Mukerjee, *Democracies of the East: A Study in Comparative Politics* (London: P. S. King and Son, 1923).

Eastern Asia, like that of Eastern Europe after the war", Mukerjee felt, lay in decentralization, which was "the old Eastern tradition".[73] This tradition spoke of separate regions, associations, and cities, each functioning with autonomy and some degree of inter-dependence. Small self-governing communities were easier to imagine as laboratories of freedom than the totalizing centralized state. Political pluralism offered a way of life that moved beyond "that unfortunate dualism between the state and the individual which has been the overgrowth of the mechanical state of the nineteenth century".[74] It was the need of the hour:

> Humanity all over the world is imprisoned in the bleak institutional orderliness of a mechanical and exploitative type of state. And nothing is more needed today than a new principle of social constitution which will once again orient man and his allegiances in natural and elastic groups for a freer expression of his gifts and instincts.[75]

The defining characteristics of modern governance – centralization, representation, delegation – had "made politics mechanical and barren".[76] What India required was a different vision of participation. The experiences of Japan and China offered cautionary tales. Both nations had long traditions of social organization and stability, and both had been adversely affected by the brutal imposition of foreign ideals. The recovery of communal life could prevent such errors at home, and rewrite the rules of comparative politics. Such an experiment would "not only be more adaptive and life-

[73] Mukerjee, *Democracies of the East*, p. viii.

[74] Mukerjee, *Democracies of the East*, p. x.

[75] Mukerjee, *Democracies of the East*, p. xxvi.

[76] Mukerjee, *Democracies of the East*, p. xvi.

giving than the imitation of Western political methods, but will also be a distinctively Eastern contribution to the political history of man…".[77] The decision to choose monism or pluralism should be context-specific; it should turn on facts such as social differentiation, religious doctrine, and historical burdens. Extensive analyses were offered on the communal character of Indian and Chinese social life to mark their departure from the West. One case study that Mukerjee presented was of property in China. This had historically been freehold and divided among male family members. There were no permanent estates as seen in the West, thereby leading to the absence of a landed aristocracy. As a result, the crucial Western distinction between the nobility and the common people, which had major implications for the development of feudalism, was absent in China. The arrival of feudalism in Western Europe encouraged the turn to individual leaders rather than community groups – power become structured around particular figures, say a bishop or some major land-owner. In China, however, empires did not end in this kind of a feudal arrangement but instead resulted in communities and associations. These networks of groups co-existed peacefully, in sharp contrast to the aggression and violence that had characterized Western societies.

The state, as imagined by Mukerjee, would not supplant social groups but respect their spheres of operation. It would exist as "a supplementary organ ... to secure for the groups the general conditions under which each can pursue its own interests and functions without coming into mutual conflict".[78] Unlike Western attempts to organize certain kinds of professional or functional groups, a key feature of the East was that

[77] Mukerjee, *Democracies of the East*, p. xxv. On Mukerjee's idea of human community, see also Radhakamal Mukerjee, *The Community of Communities* (Bombay: Manaktala, 1966).

[78] Mukerjee, *Democracies of the East*, p. 12.

groups were also given administrative powers. The hallmark of such organization was the breakdown of centralized sovereignty. This kind of federalism was more ambitious than, and conceptually distinct from, the single division of land into different territorial units. It implicated a novel notion of authority, where there were overlapping forms of power and where coordination arose organically.[79] If sovereignty was the goal of Western politics, then "the search for social unity" was the ambition of the East.[80] In polities like India and China, the state did not occur as an absolutist entity; it worked alongside local government. Here, individuals were bound by an inner moral code and village communities self-regulated their actions.[81] As an example, Mukerjee cited an ancient Indian code for merchants, the *Vaisya Dharma*. The code regulated the group, limited their earnings, and prescribed conformity to certain principles of fairness.[82] The principle of communalism was an alternative to the principle of representation – the dominant mode of political organization in the West. In pluralist arrangements, the large degree of autonomy enjoyed by local groups came alongside an imprecise notion of citizenship. Indeed, the animating theme here was not political allegiance but "sociality".[83]

Like Gandhi, Mukerjee believed that a recovery of pluralism was necessary for actual freedom. The parliamentary system has shown itself to be incapable of resolving ongoing challenges, whether they related to the problem of ethnic diversity or economic conflict. There was no small irony in the fact that the imitation of such institutions was

[79] Mukerjee, *Democracies of the East*, pp. 15-16.

[80] Mukerjee, *Democracies of the East*, p. 24.

[81] Mukerjee, *Democracies of the East*, pp. 76-77.

[82] Mukerjee, *Democracies of the East*, p. 102.

[83] Mukerjee, *Democracies of the East*, p. 89.

occurring in India, a land whose history was rich in other possibilities. A communal form of organization, built layer upon layer, was far more democratic than a parliamentary system whose leaders "are out of touch, necessarily, with their enormous constituencies, and too much dependent on agents, reporters, and even on the press".[84] In fact, even though Russia's revolutionary experiment was different from the pluralistic hope, Mukerjee praised it for challenging the status quo.[85]

Mukerjee's claims rested on the premise that the Indian village experiment *could* be revived. While he admitted the radical, perverse consequences of British legal institutions, he suggested that several parts of India were still organized around village communities. Indeed, a remarkable feature of the village had been its resilience over centuries. To underscore this, Mukerjee turned to a text on *Local Government in Ancient India*, authored by his brother Radhakumud Mookerji.[86] A defining feature of India's ancient civilization was, Mookerji had argued, the separation of the state and society. Each operated as a distinct entity and non-interference was the animating theme of state policy. Such an orientation was at odds with Western ideals, where state power was sovereign, and decentralized units, insofar as they existed, were creations of the state. The autonomous character of Indian society had enabled it to withstand political transformations and remain unaffected through the sharp vicissitudes of politics. Regimes like the Mauryan Empire had been successful because they had never aspired to a single centralized governing authority; their success lay in their capacity for federalism.[87] In

[84] Mukerjee, *Democracies of the East*, p. 166.

[85] Mukerjee, *Democracies of the East*, pp. 115-6.

[86] Radhakumud Mookerji, *Local Government in Ancient India* (Oxford: Clarendon Press, 1919).

[87] Mookerji, *Local Government in Ancient India*, p. 10.

Mookerji's narrative, Muslim rulers had often been hostile to Hindu cultural and intellectual life but the latter had nonetheless survived for it rested on "a system of organization which had an independent existence and life of its own and was impenetrable to the foreign political powers who were unable to touch it for good or evil".[88]

Apart from its historical contribution, *Local Government in Ancient India* aimed to make a practical intervention in an ongoing contest between two schools of political reform. One school sought "to introduce self-government 'from above'; the other aimed to achieve this 'from below'".[89] A turn to ancient institutions, Mookerji hoped, could show the participatory and functional value of the latter approach. It could confirm the capacity for local self-government to facilitate collective life and secure the stability of society. Crucial to Mookerji's agenda was the claim that ancient Indian local self-government was not a variant of primitive tribal forms of association. It portrayed an astounding degree of sophistication. There was considerable specialization of functions and occupations; there were well-organized industrial and commercial bodies as well as administrative organizations. To repeat but one of Mookerji's many examples of rural administration in ancient India, inscriptions dating back to the tenth century at the Perumal temple at Uttaramallur offered elaborate details of different governance committees, their respective roles, their composition and selection, and so forth.[90]

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[88] Mookerji, *Local Government in Ancient India*, p. 19.

[89] Mookerji, *Local Government in Ancient India*, p. 20.

[90] See Mukerjee, *Democracies of the East*, pp. 150-160.

By relying on *Local Government in Ancient India*, Mukerjee was suggesting that Indian village communities were capable of meeting modern challenges. This was a suggestion made throughout *Democracies of the East*. One of his noteworthy claims was about the creation and development of the law. The law operated differently in pluralistic states, but it would be a mistake to conclude that such states were lawless. Here, public law did not emerge from either private legal norms or conflicts with state action. It emerged from local traditions and practices that were manifest in customary behavior. In the case of monistic states, the law was imposed on the people; a conqueror used it to shape the conquered people in a particular fashion.[91] Here, the single sovereign authority was the source of all law; the law was a singular expression of will. In pluralistic states, however, the process was inductive – the law arose from an expression of tradition and custom. To illustrate this, Mukherjee presented a detailed study of the development and characteristics of Hindu law, from the norms of marriage and property to the principles of administration and governance.[92]

The resilience of the Indian village and its remoteness from politics had been acknowledged in colonial works. An 1812 report of a committee of the House of Commons described the structure and composition of the Indian village. In its description, village members ranged from a *curnum*, an accountant in-charge of matters relating to cultivation, to a *cowkeeper*, who took care of cattle. This organizational framework, the Report noted, had survived throughout the passage of time. Villages had suffered disasters, "war, famine, and disease", but nonetheless managed to maintain their

[91] Mukerjee, *Democracies of the East*, p. 22.

[92] Mukerjee, *Democracies of the East*, pp. 122-131.

character and makeup.[93] Political transitions left little impression on village life. A regime may come and go but "the *potail* is still the head inhabitant, and still acts as the petty judge and magistrate, and collector or renter of the village".[94] Only a few years prior to this report, Charles Metcalfe's minute on revenue collection had warned against revenue settlements with individual cultivators. Such a system, rather than one that made settlements with village communities, would disturb the structure of village constitutions. Village communities, he had noted, "seem to last where nothing else lasts".[95] They were untouched by political revolutions, undisturbed by external developments, and secure in their group identity. It would be a mistake to encourage individual interests in such an established form of community life. In subsequent decades, the major contribution was of course Maine's, whose work would be a source of ideas and inspiration for Indian pluralists.[96]

Mukerjee acknowledged these references but argued that even if Indian village communities had sometimes been recognized, they had been portrayed as primitive and backward. Even a scholar as sensitive as Maine, Mukerjee lamented, had taken the shift from status to contract to be a universal one, thereby influencing others to see the transition from communal to individual forms of life as a sign of progress.[97] Maine's

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[93] *The Fifth Report from the Select Committee of the House of Commons on the Affairs of the East India Company*, 28 July 1812 (Volume I) (Walter Kelly Firminger ed., Calcutta: R. Cambray & Co., 1917) 158.

[94] Report on the Affairs of the East India Company, p. 158.

[95] Minute of Charles T. Metcalfe, 7 November 1830, *Minutes of Evidence taken before the Select Committee on the Affairs of the East India Company* (Part III) (London: J. L. Cox and Son, 1833), p. 331.

[96] See Mantena, "On Gandhi's Critique of the State: Sources, Contexts, Conjunctures", pp. 540-545. For Maine's account of the village community, see Maine, *Village-Communities in the East and West*; Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (London: John Murray, 1861).

[97] Mukerjee, *Democracies of the East*, p. 297.

Ancient Law, Mukerjee felt, had remained hostage to Western paradigms and was simply "a presentment of Roman legal history".[98] For Mukerjee, this narrative of advancement needed displacing. The Indian village needed to be given a new past and a new future.

Democracies of the East is best seen as a work of historical sociology. It attended to subjects ranging from judicial administration to property rights to economic policy. India's many regions and races were considered and distinguished. Time periods were identified and evaluated. From the sources of revenue to the intricacies of governance to the varieties of hierarchy, the Indian village was carefully deconstructed. It was painted as vibrant, peaceful, and stable; alternatively, the monistic state was presented as an idea whose time had passed. As recent work has shown, Gandhi and Mukerjee were part of a global tradition of political pluralism whose members included figures like Harold Laski and G. D. H. Cole.[99] The closing pages of *Democracies of the East* reveal the reach of this tradition. Mukerjee relied on, for example, on a contribution by George H. Sabine in *The Philosophical Review* in 1920.[100] Sabine had argued that the historical conditions under which state power was conceived had faded away. Initially power had been divided among the Church, the Holy Roman Empire, and feudal lords, and only gradually did the realm of the political acquire independence. It was the advent of royal absolutism, the unrestrained power of the King, that had opened the door to the idea of a sovereign state.

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[98] Mukerjee, *Democracies of the East*, p. 34.

[99] Mantena, "On Gandhi's Critique of the State: Sources, Contexts, Conjunctures". The literature on political pluralism is vast, but recent important contributions include David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997); Marc Stears, *Progressives, Pluralists, and the Problems of the State: Ideologies of Reform in the United States and Britain, 1906-1926* (Oxford: Oxford University Press, 2002).

[100] Mukerjee, *Democracies of the East*, p. 339, citing George H. Sabine, "The Concept of the State as Power", 29 *Philosophical Review* 301 (1920).

The relationship between the sovereign and the subject became the framework for modern politics. Yet the eventual abstraction of sovereign authority and the theory of parliamentary sovereignty were unable to match the fluid reality of power. A wide variety of bodies like courts and executive officers and governmental agencies created law and operated with degrees of independence, thereby making it hard to view the state as a single, unitary law-creating body. For Sabine, the idea of sovereignty had been reduced to a formal one and bore little resemblance to the actual functioning of modern politics.

Expectedly, Mukerjee's other sources included Laski, and his 1917 *Harvard Law Review* note on Léon Duguit. The note began with a grand declaration: "We seem on the threshold of a new epoch in the history of the state".[101] For Laski, the emphasis on state coercion had been a philosophical as well as a sociological error. It presented a model of power that failed to pay due attention to the reality of consent. A parliamentary statute that prevented Englishmen from being Roman Catholics would, for example, fail to have any effect.[102] Mukerjee also referenced Duguit directly and others like Roscoe Pound, showing both the range of his influences and the burgeoning support for his agenda. He felt that communalism had special potential in the East, for it represented "a principle of social grouping in which the including group stands not for partial, hypostasized interests of the segmented man, but for the concrete interest and representing the whole personality".[103] The West, in contrast, faced a greater challenge with competing group identities and the absence of organizational constraining structures at the local level. For

[101] Harold J. Laski, "A Note on M. Duguit", 31 *Harvard Law Review* 186 (1917), p. 186.

[102] Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917), p. 12.

[103] Mukerjee, *Democracies of the East*, p. 352.

India to embark on this transformative political project, it merely needed to return to its own history. It needed to see that the "future belongs not to imperialism but to federalism" and that "the secret of the federal spirit is the group principle".[104]

Both Gandhi and Mukerjee did more than challenge the inevitability of the transition from empire to statehood. Each put forth plans for giving effect to pluralism. The village, for them, would be the center of political activity and the sole location for direct elections. Mukerjee envisioned a harmonious model of pluralism, with quasi-autonomous bodies functioning together. He imagined a "peasant democracy rising layer upon layer from the old and essential local and functional groupings" that would gradually federate into a national assembly.[105] The schema would recover a "democratic process that begins, not in parliament, but right at from the bottom in myriads of local bodies and assemblies".[106] Gandhi, somewhat differently, viewed the village as a secluded space and a classroom for the perfecting individual self-discipline. It was a freestanding, isolated entity, giving his political vision an anti-statist edge. It meant that Gandhi's pluralism was effectively a form of anarchism; the violent commanding state was replaced by non-hierarchical internal forms of authority.[107] The cooperative bent embodied by Mukerjee's account is seen in his description of the difference between the pluralist constitutional vision and traditional sovereignty-based accounts:

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[104] Mukerjee, *Democracies of the East*, p. 357.

[105] Mukerjee, *Democracies of the East*, p. 364.

[106] Mukerjee, *Democracies of the East*, p. 156.

[107] Mantena, "On Gandhi's Critique of the State: Sources, Contexts, Conjunctures", pp. 553-558.

> In the monistic state-type a constitution expressing the undivided will of the community is created, and then a magistracy is established in connection with the constitution, which represents the original, unlimited, and central ratifying will or fiat imposed upon all persons, associations, and things within its jurisdiction. In the pluralistic state-type the constitution differentiates the particular spheres of the diverse organs of the body-politic from one another as well as from the State, and creates a divided, multicellular political control, maintained by custom or voluntary co-operation.[108]

Prior attempts at decentralization, like the Local Self-Government Act of 1885, were seen by Mukerjee as insufficiently modest. They did not involve any restructuring of power. The unions and *taluk* boards were still part of the overall centralized bureaucratic apparatus. Such attempts did not recover the community; as far as they were concerned, "the community ceases to exist in the eyes of the law".[109] The path to change could take place through radical legislation. To inaugurate a "new track of modern constitutionalism",[110] Mukerjee proposed that a "detailed code should be drawn up to show the limits of jurisdiction and the nature of the cases for which no appeal will lie from the decision of the *panchayat*".[111]

The daily experience of politics would be very different under such conditions. In *Hind Swaraj*, Gandhi had observed how modern politics had simply collapsed into a struggle for power. Mukerjee lamented the same reality, seeing the centrality of political parties as a major failure of Western parliamentarianism. The majority in a legislative chamber was no longer a representative of the majority of the population but an

[108] Mukerjee, *Democracies of the East*, p. 146.

[109] Mukerjee, *Democracies of the East*, p. 326.

[110] Mukerjee, *Democracies of the East*, p. 166.

[111] Mukerjee, *Democracies of the East*, p. 325.

unworkable collection of different minorities. All attention was devoted to acquiring positions of office rather than to addressing matters of principle. A turn to localism could prevent this kind of capture. In the schema that Mukerjee sketched, small units would not have "limited and qualitied powers delegated to them from above", "a half-measure" that he referred to as "discouraging and demoralizing".[112] Further, the units would recognize various kinds of diversity, including regional and functional, and thereby disable conflict. He allowed "ample room for experiments as regards the electorate and franchise basis … to counteract such disadvantages as the narrow and sectional outlook of functionally organized units or the crude majority rule and lack of local attachment of the population franchise".[113] The institutions of Indian civilization, its "noblest products" like temples and academies and town-hall, had been built through participation and involvement by locals.[114] Indian law had developed in these institutions through deliberation, judgment, and unanimity. This new vision of constitutionalism would shift the focus from "checks and balances" to "the organization of social and personal values and primary satisfactions".[115] The power of bottom-up constitutionalism was precisely that its rules were not imposed rigidly and universally. The purpose of the constitutional schema would be to liberate local units from the control of other authorities.

[112] Mukerjee, *Democracies of the East*, p. 360.

[113] Mukerjee, *Democracies of the East*, p. 361.

[114] Mukerjee, *Democracies of the East*, p. 363.

[115] Mukerjee, *Democracies of the East*, p. 149.

In 1946, Shriman Narayan Agarwal, an economist and self-proclaimed Gandhian, put forth a constitutional proposal giving effect to the pluralist vision.[116] In a previous text, Agarwal had highlighted Gandhi's concerns with modern civilization.[117] The immediate context for that work had been the growing support for national planning, and Agarwal warned against "imposing a rigid and elaborate plan on a nation".[118] India's ancient economy, with its cottage industries, non-violent path to economic equality, and its respect for manual labor held greater promise for the development of a fulfilling life. In a comment on the text, Gandhi spoke of "70,000 villages of India dominating the center with its few towns required in the interest of the villages".[119]

In a *Gandhian Constitution for Free India*, Agarwal turned his attention to constitutions. Such texts, he felt, were "always in the nature of organic growth" and it was "most unscientific to foist on a country a system of administration foreign to its own genius".[120] Indians would "betray gross ignorance of sociological sense" in impersonating Western frameworks.[121] Western democracy was, he remarked, in a state of profound disarray. It had experienced widespread malfunction and collapse, often paving the way for totalitarian regimes. As practiced, democracies tended to concentrate power, succumbed to the influence of capital, and were unable to serve the common man.

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[116] Shriman Narayan Agarwal, *Gandhian Constitution for Free India* (Allahabad: Kitabistan, 1946). The text featured a foreword by Gandhi.

[117] Shriman Narayan Agarwal, *The Gandhian Plan of Economic Development for India* (Bombay: Padma Publications Ltd., 1944). This text, too, contained a foreword by Gandhi.

[118] Agarwal, *The Gandhian Plan of Economic Development for India*, p. 5.

[119] Mohandas K. Gandhi, Interview to P. Ramachandra Rao, 19 June 1945, in *The Collected Works of Mahatma Gandhi* (Volume 80) (Government of India: Publications Division, 1980) 352, p. 353.

[120] Agarwal, *Gandhian Constitution for Free India*, p. 11.

[121] Agarwal, *Gandhian Constitution for Free India*, p. 11.

Small institutional changes could not resolve these failures. Ongoing experiments, like Soviet Russia's effort at a planned economy, had "reduced individuals to, more or less, non-entities and automatons".[122]

Instead, a new form of association structured around the village was needed. Village communities would enable active citizen participation, and co-operative agriculture and industry would prevent economic exploitation. The village in Agarwal's imagination was not an isolated entity. In terms more reminiscent of Mukerjee's writings than Gandhi's, he spoke of a coordinated framework with "rural republics gradually [passing] into larger political organizations on a federal basis rising layer upon layer from the lower rural stratifications on the broad basis of popular self-government".[123] Village panchayats would be chosen on the basis of direct elections and enjoy wide powers of administration, security, industry, and public welfare. They would also, notably, have the power to administer justice. The British judicial system had, Agarwal lamented, "worked havoc in the socio-economic life of the country".[124] The system had created exploitative lawyers, unaffordable procedures, and its working led to a thorough neglect of the truth. A judicial order operated by panchayats would "not only be simple, prompt and cheap but also 'just' because the details of civil and criminal cases will be, more or less, open secrets in the village and there shall be hardly any scope for fraud and legal juggleries".[125] Higher bodies (*talukas* and district panchayats) would be indirectly elected and possess advisory rather than commanding powers.

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[122] Agarwal, *Gandhian Constitution for Free India*, p. 51.

[123] Agarwal, *Gandhian Constitution for Free India*, p. 68.

[124] Agarwal, *Gandhian Constitution for Free India*, p. 97.

[125] Agarwal, *Gandhian Constitution for Free India*, p. 98.

In this proposal of bottom-up constitutionalism, where "the whole system will be turned upside down", the state was seen as both problematic and unnecessary.[126] It was problematic for its violent, indifferent, and corrupt ways of functioning; it was unnecessary because Indian society, in and of itself, had the internal resources for solving the problems that the state was meant to fix. It had been self-sustaining in the past and, as such, it had the potential to be self-sustaining in the future. Rather than collectivize agency, the political pluralists sought to internalize it. Instead of a state, they offered a landscape of group networks that could enable the practice of individual self-discipline. As we shall see, this vision was decisively rejected – and, in holding a different view of the state, its detractors exposed their very different view of Indian society.

III

In the years that pluralist thought flourished, a parallel discourse around centralization and modernization emerged. An early contribution to this conversation was M. Visvesvaraya's 1920 text *Reconstructing India*.[127] Visvesvaraya was a prominent engineer who had served as the Dewan of Mysore. Perceiving the end to alien rule as imminent, he turned to the task of Indian nation-building. For him, such an inquiry was critical. India boasted of appalling standards of living. The condition of primary and higher education, the inattention towards local industry, the pre-modern modes of agricultural production, etc., had led to dire economic circumstances. India's performance

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[126] Agarwal, *Gandhian Constitution for Free India*, p. 135.

[127] M. Visvesvaraya, *Reconstructing India* (London: P. S. King & Son, 1920).

was miserable across indicators ranging from health and literacy to infrastructure capacity and industrial production.[128] Visvesvaraya held the colonial state responsible for this lack of progress. And Indians, themselves, had only made matters worse by subscribing to ancient customs. But Visvesvaraya did not see this situation as permanent. Change was possible though it would require Indians to embrace modern forms of organization and outlook. He termed this challenge to be "The Indian Problem".[129]

The context for Visvesvaraya's text was the Government of India Act of 1919. He studied its features and considered further steps toward advancement. "In the forefront of the reconstruction problems", he observed in a chapter on provincial administration, "should be put the expansion of the urban populations, the extension and improvement of educational facilities and economic development".[130] Such efforts would mark a transition in the government's focus from "the maintenance of order" to "progress".[131] In topics as diverse as public works, technical education, and fiscal management, Visvesvaraya consistently employed the language of welfare, accountability, and efficiency. He urged Indians to "abandon the idea once and for all that development will come in the course of time without study, preparation, effort or the expenditure of money" and to "be prepared to pay taxes and make sacrifices".[132]

Reconstructing India surveyed a number of global strategies for modernization. The training of personnel and experts, the establishment of oversight boards and

[128] Visvesvaraya, *Reconstructing India*, pp. 17-35.

[129] Visvesvaraya, *Reconstructing India*, pp. 1-16.

[130] Visvesvaraya, *Reconstructing India*, p. 65.

[131] Visvesvaraya, *Reconstructing India*, p. 63.

[132] Visvesvaraya, *Reconstructing India*, p. 93.

commissions, the creation of a federal reserve banking system, the practice of government subsidies, the use of science and technology, the reliance on statistics and data collection, improvements in infrastructure, and so forth were all noted. Education was seen as central for economic progress and social reform. To advance, India needed to improve the yield and quality of agricultural production, transition from an agricultural to an industrial economy, and become competitive in domestic and international trade. In Visvesvaraya's analysis, the role of the state was critical. He noted, for instance, support for state control of major services in the United Kingdom. [133] One comparative lesson that he drew was that "industries and trade do not grow of themselves, but have to be willed, planned and systematically developed".[134] His particular schema, say on education or infrastructure, is less important for our purpose here. What is instead noteworthy is his understanding of the Indian problem. Modernization was the defining mission, and a non-partisan, rationalistic orientation was vital to that mission.

Visvesvaraya's text was among the first serious manifestos for Indian development. The themes he touched on would be taken up by several others in following decades. The most important figure to embrace the modernization project during these years was Jawaharlal Nehru. It was only by way of some formula of state control that Nehru believed that poverty could end, unemployment could decrease, and the material conditions of life could change. Socialism was "the inevitable step to social and economic change".[135] *Khadi* and village industries – the hallmarks of Gandhi's

[133] Visvesvaraya, *Reconstructing India*, pp. 119-121.

[134] Visvesvaraya, *Reconstructing India*, p. 133.

[135] Jawaharlal Nehru, Presidential Address to the Lucknow Congress, 12 April 1936 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 170, p. 181.

unconventional vision – were meaningful, but Nehru viewed them "as temporary expedients of a transition stage rather than as solutions of our vital problems". It was only through "the rapid industrialization of the country" that "the standards of the people [would] rise substantially and poverty [would] be combated".[136]

By the time India entered the 1940s, the work of the National Planning Committee, which came into being in 1938, and its subcommittees had cast considerable light on the subject of planning. Nehru's role in this regard was significant.[137] His note to the Committee in 1939, in particular, merits some attention. For "economic regeneration" to occur, Nehru claimed, one had to industrialize.[138] Drawing on the Congress's Karachi Resolution, which had given the state power over major services, Nehru argued that all large scale enterprises must be controlled and regulated if not owned by the state.[139] In his note, Nehru appealed to a particular vision of democracy – entailing equality and a standard of living – and linked this to the planning agenda:

> The ideal of the Congress is the establishment of a free and democratic state in India. Such a full democratic state involves an egalitarian society, in which equal opportunities are provided for every member for self-expression and self-fulfillment, and an adequate minimum of a civilized standard of life is assured to each member so as to make the attainment of this equal opportunity a reality. This should be the background or foundation of our plan.[140]

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[136] Nehru, Presidential Address to the Lucknow Congress, p. 182.

[137] See Sarvepalli Gopal, *Jawaharlal Nehru: A Biography* (Volume 1) (New Delhi: Oxford University Press, 1975), pp. 245-248.

[138] Jawaharlal Nehru, Note to the National Planning Committee, 4 June 1939, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 9) (S. Gopal ed., New Delhi: Orient Longman, 1976) 375, p. 378.

[139] Nehru, Note to the National Planning Committee, p. 378.

[140] Nehru, Note to the National Planning Committee, pp. 377-378.

Both here, and in a separate note, industrialization was seen as essential to the realization of freedom.[141] Initially, Nehru indicated that industrialization could occur alongside a commitment to the village economy. He underplayed, even denied, any conflict between Gandhi's vision and his own. The problems of India were so severe that they could not be solved by any one approach. Village industries could, for example, play a part in reducing unemployment even if they could not do much to improve production.[142] As time progressed, however, Nehru confronted the Gandhian alternative more seriously. In a letter to the Mahatma in 1945, he rejected the supposed link between non-violence and village life. Villages, Nehru asserted, were "backward intellectually and culturally and no progress can be made from a backward environment".[143] The consequence of such an environment was the creation of narrow-minded individuals, and such persons were "much more likely to be untruthful and violent".[144] Nehru reiterated the importance of material needs – clothing, food, shelter – and the belief that only heavy industrialization could enable their provision.[145] India's "immediate problem" was "appalling poverty and unemployment".[146] The solution was "a rapid growth of industry, scientific agriculture

[141] See Jawaharlal Nehru, Note on the Guidelines for Planning, 19 June 1939, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 9) (S. Gopal ed., New Delhi: Orient Longman, 1976) 385, p. 386.

[142] See Jawaharlal Nehru, "China Rebuilds for Democracy", 2 July 1942, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 12) (S. Gopal ed., New Delhi: Orient Longman, 1979) 568, pp. 569-571.

[143] Jawaharlal Nehru, Letter to Mohandas K. Gandhi, 4 October 1945, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 14) (S. Gopal ed., New Delhi: Orient Longman, 1981) 554, p. 554.

[144] Nehru, Letter to Mohandas K. Gandhi, p. 554.

[145] Nehru, Letter to Mohandas K. Gandhi, p. 555.

[146] Jawaharlal Nehru, "The Purpose of Planning", 4 October 1940, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 11) (S. Gopal ed., New Delhi: Orient Longman, 1978) 315, p. 315.

and the social services, all coordinated together, under more or less state control, and directed towards the betterment of the people as a whole".[147] In making his case, Nehru underlined the importance of scientific advancement. For a country to retain independence in the modern world, it would have to control the tools of science.[148] He viewed the ideas in *Hind Swaraj* as "completely unreal".[149]

Gandhi had seen modernization as foreign rule by another name. But Nehru saw his own agenda as being more ambitious. He desired, as he put it in *An Autobiography*, "a new state and not just a new administration".[150] Nehru argued that it was not large-scale industrialization that had brought about violence or injustice but instead private capital. The problem was capitalism rather than industrialization: "It is essentially private ownership and the acquisitive form of society that encourage a competitive violence. Under a socialist society this evil should go, at the same time leaving us the good which the big machine has brought."[151] Western democratic institutions had indeed failed. But it was wrong to read this failure as a failure of representative democracy. Instead, Nehru regarded the problem to be "the unholy alliance of capitalism, property, militarism and an over-grown bureaucracy, and assisted by a capitalist press".[152] Economic power had

[147] Nehru, "The Purpose of Planning", p. 315.

[148] Nehru, Letter to Mohandas K. Gandhi, p. 555.

[149] Nehru, Letter to Mohandas K. Gandhi, p. 556.

[150] Jawaharlal Nehru, *An Autobiography* (New Delhi: Penguin Books, 2004 [1936]), p. 435.

[151] Jawaharlal Nehru, Letter to Krishna Kripalani, 29 September 1939, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 10) (S. Gopal ed., New Delhi: Orient Longman, 1977) 539, p. 540.

[152] Jawaharlal Nehru, "Roads to Freedom", sometime after April 1919 (incomplete review) in *Selected Works of Jawaharlal Nehru* (First Series, Volume 1) (S. Gopal ed., New Delhi: Orient Longman, 1972) 140, p. 142.

become all too easy to translate into political power. The solution did not lie in rejecting Western democracy but in freeing democracy from such "malign influences".[153]

The turn to centralization rejected the imperial premise in two respects. It denied the proposition that modernization was a pre-requisite for self-government, and it rejected the idea that the colonial state had done anything to improve material conditions. The colonial government was, at its core, a police state. In *An Autobiography*, Nehru charged it with creating fear among the people and being indifferent to education, health, working conditions, etc.[154] He would hold the same view in later years, attacking the Raj's inattention towards social development. A democratic government, Nehru believed, would be a government committed to welfare because it would rest on consent.[155] The people would be attentive to domination and their supervision would constrain the forces of capitalism.[156]

A centralized state made possible a planned economy – and it held the promise of equal advancement of India's different units.[157] In a country whose regions lacked the capacity and resources for industrial activity, experimentation, and initiative, no other option seemed viable. As the 1940s progressed, the case for modernization continued to gain momentum. In the early years of this decade, Visvesvaraya delivered another

[153] Nehru, "Roads to Freedom", p. 142.

[154] Nehru, *An Autobiography*, p. 452.

[155] Jawaharlal Nehru, "The Feudal Demand for Pakistan", 17 December 1945 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 14) (S. Gopal ed., New Delhi: Orient Longman, 1981) 269, pp. 269-270. See also Jawaharlal Nehru, *The Discovery of India* (New Delhi, Penguin 2004 [1946]), p. 552.

[156] Jawaharlal Nehru, Interview, 8 July 1945, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 14) (S. Gopal ed., New Delhi: Orient Longman, 1981) 35, p. 36. Nehru had previously expressed similar faith in the responsiveness of democratic politics. See Nehru, *An Autobiography*, p. 465.

[157] See Jawaharlal Nehru, Interview, 22 May 1942, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 12) (S. Gopal ed., New Delhi: Orient Longman, 1981) 1979, p. 327.

contribution – *Prosperity through Industry* – that expressed the sentiment at the time.[158] He reiterated his previously expressed horror at India's poverty and declared that the "promotion of industries is the one development which, if vigorously pursued and persisted in, promises to give rich results in the way of improved living conditions to the average citizen in an appreciably short time".[159] He lamented the "many defects in outlook and behavior" left behind by India's traditions and the "host of factors in our social system which militate against progress".[160] As before, he placed particular emphasis on mass education. In the absence of a literate, trained population, India would fail to transition to an industrial economy. *Prosperity through Industry* detailed how industries might be established and operated, from initial market research to the proper maintenance of accounts; it described how they should be classified; and it considered both central and regional organizations for their promotion. Visvesvaraya called on leaders to rouse the people and enlist them in the industrialization mission; he sought to create a co-operative spirit that could carry India into a new age of modern civilization.

Texts such as *Prosperity through Industry* were noteworthy but the most prominent document of the decade was arguably the *Memorandum Outlining a Plan of Economic Development for India*, authored by a group of influential industry leaders in 1944.[161] The Bombay Plan, as it was called, sought to double per capita income in a period of fifteen years. It called for massive increases in output from industry, services,

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[158] M. Visvesvaraya, *Prosperity through Industry: Move Towards Rapid Industrialization* (Bombay: The All-India Manufacturers' Organization, 1943).

[159] Visvesvaraya, *Prosperity through Industry*, pp. 1-2.

[160] Visvesvaraya, *Prosperity through Industry*, p. 51.

[161] Sir Purshotamdas Thakurdas et. at., *A Plan of Economic Development for India* (London: Penguin Books, 1945).

and agriculture, with industrial output carrying the bulk of this transformation. The Plan highlighted the significance of social services, especially education; it offered proposals for the sourcing of capital; and it made India, in the words of an early commentator, "planning-conscious".[162] Above all, it placed centralized state control at the heart of the country's economic future. In the week before India became a republic, a resolution by the Congress Working Committee affirmed this agenda with great force, and put forth a proposal for a planning commission.[163]

It is important to see that modernization, as it was understood, was more than a desire for material progress. Underlying the search for equal standards of living, as revealed in Nehru's aforementioned reply to Gandhi, was the search for a different kind of citizenship. By displacing the local, a centralized state promised a new form of political association. It would allow natives to transcend their local lives and co-exist under a single authority, thereby placing them in a different relationship with one another. Local government, for Nehru, simply could not enable a modern politics:

> [O]ur local bodies are not, as a rule, shining examples of success and efficiency, though they might, even so, compare with some municipalities in advanced democratic countries. They are not usually corrupt; they are just inefficient, and their weak point is nepotism, and their perspectives are all wrong. All this is natural enough; for democracy, to be successful, must have a background of informed public opinion and a sense of responsibility. Instead, we have an all-pervading atmosphere of authoritarianism, and the accompaniments of democracy are lacking. There is no mass educational system, no effort to build up public opinion

[162] P. S. Lokanathan, "The Bombay Plan", 23 *Foreign Affairs* 680 (1945), p. 685. On the Plan and its post Second World War context, see Srinath Raghavan, *India's War: The Making of Modern South Asia 1939-1945* (London: Allen Lane, 2016), pp. 435-438.

[163] See Resolutions passed by the Congress Working Committee, 17-20 January 1950, in *INC: The Glorious Tradition* (Volume 4) (A. M. Zaidi ed., New Delhi: Indian Institute of Applied Political Research, 1987) 463, pp. 464-468.

> based on knowledge. Inevitably public attention turns of personal or communal or other petty issues.[164]

Nehru had long spoken similarly of India's other hidden pocket, namely the princely kingdoms. He saw these units as operating as independent fiefdoms; they were not only apathetic toward the struggle against rule, but moreover represented a mode of collective life that was a thing of the past. "The states", he wrote, "are dark and wholesome corners in India where strange things happen and people disappear leaving no trace behind".[165] They were identifiable by "their backwardness and their semi-feudal conditions" and were "personal autocracies, devoid even of competence or benevolence".[166]

The idea that a centralized state meant the inauguration of a new form of citizenship found repeated appearance in Ambedkar's writings. Like Nehru, Ambedkar recognized the widespread discontent with parliamentary democracy.[167] Even among countries that were opposed to authoritarian rule, democracy was an idea for which support was fast declining. What had ruined this idea, Ambedkar argued, was the freedom of contract. Political democracy had been encouraged without social and economic democracy; in other words, liberty had been promoted but equality had been ignored.[168] Gandhi's response to this reality, Ambedkar alleged, was both unoriginal and

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[164] Nehru, *An Autobiography*, p. 153.

[165] Jawaharlal Nehru, Report to the All India Congress Committee. at Haripura, 17 February 1938, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 8) (S. Gopal ed., New Delhi: Orient Longman, 1976) 751, p. 756.

[166] Nehru, *An Autobiography*, p. 122.

[167] B. R. Ambedkar, "Labor and Parliamentary Democracy", 17 September 1943, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 10) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 106, p. 107.

[168] Ambedkar, "Labor and Parliamentary Democracy", pp. 108-109.

primitive.[169] Moreover, he saw it as flawed. In the same vein as Nehru, Ambedkar asserted that the problem was not modern civilization but the importance granted to institutions like private property and the power wielded by private capital. "If machinery and civilization have not benefitted everybody", Ambedkar contended, "the remedy is not to condemn machinery and civilization but to alter the organization of society so that the benefits will not be usurped by the few but will accrue to all".[170] He went so far as to suggest that the Gandhian solution was simply incompatible with democracy:

> Gandhism may be well suited to a society which does not accept democracy as its ideal. A society which does not believe in democracy may be indifferent to machinery and the civilization based upon it. But a democratic society cannot. The former may well content itself with life of leisure and culture for the few and a life of toil and drudgery for the many. But a democratic society must assure a life of leisure and culture to each one of its citizens. If the above analysis is correct then the slogan of a democratic society must be machinery and machinery, and civilization and more civilization. Under Gandhism, the common man must keep on toiling ceaselessly for a pittance and remain a brute. In short, Gandhism with its call back to nature, means back to nakedness, back to squalor, back to poverty and back to ignorance for the vast mass of the people.[171]

Gandhi had targeted industrialization regardless of whether it was driven by the state. As far as he was concerned, centralized industries were a problem even if they were owned by the state. In fact, "the obligation to increase wants will not only not decrease, but may be strengthened were such industries are owned by the state".[172] Gandhi felt, as we have

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[169] B. R. Ambedkar, *What Congress and Gandhi have done to the Untouchables*, 1945, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 9) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 1, pp. 282-3.

[170] Ambedkar, *What Congress and Gandhi have done to the Untouchables*, p. 283.

[171] Ambedkar, *What Congress and Gandhi have done to the Untouchables*, p. 284.

[172] Mohandas K. Gandhi, "How to Improve Village Industries", p. 152.

noted, that ending Western rule without Western institutions would simply replace one form of domination by another. Ambedkar took this argument and turned it on its head. The removal of Western rule alongside the preservation of Indian society, he claimed, entailed retaining a social structure that legitimized domination.[173] Earlier, as member of the Bombay Legislature, Ambedkar had identified the village system as the sole reason for the absence of Indian nationalism. The village, for him, "made all people saturated with local particularism, with local patriotism. It left no room for larger civic spirit".[174]

Centralization promised this civic spirit. The idea that federalism was a conservative force in politics emerged with special power in the aftermath of the Government of India Act of 1935. The statute recognized the princely states and envisaged a federation between them and the rest of India. Indians complained bitterly about this support for non-democratic rule, and saw the pact as an impediment to achieving independence.[175] Moreover, the experience with provincial autonomy allowed Nehru to link citizenship and welfare:

> The working of provincial autonomy, restricted as it was, had many dangers for us. It tended to emphasize, as it was no doubt meant to, provincialism and diverted our anti-imperialist struggle into narrower channels. Because of this, internal conflicts grew – communal, social, and organizational. The major problems of poverty, unemployment, the land,

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[173] Ambedkar, *What Congress and Gandhi have done to the Untouchables*, pp. 290-291.

[174] B. R. Ambedkar, "On Village Panchayats Bill: 1", 6 October 1932, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 2) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 104, p. 106.

[175] See, for example, K. T. Shah, *Federal Structur*e (Bombay: Vora and Company, 1937), p. 101. See also B. R. Ambedkar, "Federation versus Freedom", 29 January 1939, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 1) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 279.

> industry, clamoured for solution, and yet they could not be solved within the framework of the existing constitution and economic structure.[176]

Nehru and Ambedkar thus came to believe that radicalism was only possible with distance. What the pluralists saw as participation, they saw as localism. The lower one went in choosing the location of power, the more society would infiltrate the state. As a result, both felt that proximity to the exercise of power did not necessarily involve greater democracy. And they also believed that democracy, as an idea, meant more – it meant carrying India's millions out of poverty. Nehru and Ambedkar spent much of their lives occupied with somewhat separate concerns. If Nehru was more attentive to the promise of economic transformation, Ambedkar displayed greater interest in the afflictions of caste. But they shared an understanding of power that went beyond formal, legal conceptions; an understanding that entailed a deeper sociology. To determine where to locate power one would have to determine where the constraints of society were least. One would have to invent a force that could dismantle the structures of influence that pervaded India's provincial villages and feudal havens. That force was the centralized state.

IV

The abovementioned political sociology found expression in the sessions of the Constituent Assembly. As we have noted, the Assembly initially conveyed openness to the idea of local autonomy. The Aims and Objectives Resolution, for instance,

[176] Jawaharlal Nehru, "Where Are We?", March 1939, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 9) (S. Gopal ed., New Delhi: Orient Longman, 1976) 488, pp. 501-502.

acknowledged the independent character of regional units.[177] This support for federalism hoped to meet the concerns of the Muslim League. The consideration was not, in one member's words, the "best interests" of India.[178] Partition marked the failure of this attempt, and the event was followed by a resounding endorsement of centralization. But the mass migration and communal violence that Partition unleashed did not by itself shape the decision to centralize. Partition mattered not because it forced a new way of thinking but because it validated prior beliefs. The drama and horror it involved confirmed previously held understandings of Indian society. Much the same might be said of other traumatic historical episodes. Take, for example, the Bengal famine of 1943. The famine was taken to reveal the sheer incapacity of provincial governments, administratively but also in terms of outlook. Without outside support, regional units would simply unravel. As one member from Bengal observed, "If the center cannot interfere in cases where there is communal disturbance or there is famine, then we will have to consider what will happen to the people of those provinces".[179] The tragedy, it was claimed, would have been prevented had the federal government been able to intervene in local administration.[180]

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[177] Clause 3, Aims and Objects Resolution, Constituent Assembly of India, in *Constituent Assembly Debates* (Volume 1), p. 59.

[178] Speech by Purushottam Das Tandon, Constituent Assembly of India, 13 December 1946, in *Constituent Assembly Debates* (Volume 1), p. 67.

[179] Speech by P. R. Thakur, Constituent Assembly of India, 25 January 1947, in *Constituent Assembly Debates* (Volume 2), p. 357.

[180] See Speech by Hirday Nath Kunzru, Constituent Assembly of India, 25 August 1947, in *Constituent Assembly Debates* (Volume 5), p. 146; Speech by Shibban Lal Saksena, Constituent Assembly of India, 2 August 1949, in *Constituent Assembly Debates* (Volume 9) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 109.

The Assembly's proceedings were laced with themes that had shaped the conversation over centralization in preceding years. Members spoke of the need for industrial development.[181] They feared that India's units would be in constant battle unless they were moderated by a strong central force.[182] The reason for "the unity of public life", it was declared, had been the overarching administrative structure in place from the Charter Act of 1833 to the Government of India Act of 1935.[183] It was stated that the real danger was not excessive central power but "fissiparous tendencies [that] may gather momentum and, as in the past they have led to the downfall of empires and kingdoms, may lead to the same fate".[184] Underlying these observations, and intense technical struggles over the legal division of power, were divergent imaginings of the state and society. Ultimately, the Constitution conferred extraordinary powers to the federal government. These included powers that operated in ordinary times, such as the residuary power of legislation, as well as emergency powers targeted at specific crises. Notable among the latter was the authority to dismiss regional governments and take over their administration in the case of a "failure of constitutional machinery".[185]

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[181] Speech by Brajeshwar Prasad, Constituent Assembly of India, 9 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 372.

[182] Speech by S. H. Prater, 21 January 1947, Constituent Assembly Debates, in *Constituent Assembly Debates* (Volume 2), p. 307.

[183] Speech by K. M. Munshi, 16 June 1949, Constituent Assembly Debates, in *Constituent Assembly Debates* (Volume 8) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 927-928.

[184] Speech by Brajeshwar Prasad, 15 November 1949, Constituent Assembly Debates, in *Constituent Assembly Debates* (Volume 11), p. 515.

[185] Article 356, Constitution of India, 1950.

Strong emergency provisions were viewed as essential in a new democracy.[186] The power to terminate regional governments was regarded as "the responsibility of the federation".[187] It was a way to offer stability in administration. The clause had been modeled on Section 93 of the 1935 Act, a controversial provision under which Congress governments had been dismissed when India was injected into the Second World War. Section 93 had been severely attacked by Indian nationalists, who saw it as exemplifying "the distrust of the Indian politician".[188] But the Assembly rejected the analogy between the 1935 Act and the Constitution. The latter was based on representative government; any action taken under it would be an action having popular support. Moreover, extant circumstances cried out for such a provision:

> We are in grave and difficult times. The units are of different dimensions and responsible government has not been at work, in some of the units at any rate, for a very long time. Even suffrage is unknown in certain states, and we have introduced responsible government into the states not all of which are like the advanced units of what might be called the old British Indian provinces. Under those circumstances, in the interest of the sound and healthy functioning of the Constitution itself, it is necessary that there should be some check from the Centre so that people might realize their responsibility and work responsible government properly.[189]

India's internal reality grew worse in the case of the princely states. These entities operated with varying but considerable internal autonomy. The 1935 Act had taken the

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[186] Speech by Shibban Lal Saksena, Constituent Assembly of India, 2 August 1949, in *Constituent Assembly Debates* (Volume 9), p. 109.

[187] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 25 July 1947, in *Constituent Assembly Debates* (Volume 4), p. 847.

[188] See, for example, K. T. Shah, *Provincial Autonomy* (Bombay: Vora & Co., 1937), pp. 246-248.

[189] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 3 August 1949, in *Constituent Assembly Debates* (Volume 9), p. 151.

emerging political recognition of the princely states forward, creating an all-India federation between the states and provinces. The Act, it was hoped, would weaken the Congress and secure the colonial state.[190] This institutional framework never came into effect, but it did invite harsh criticism from Indians. Over the next decade or so, the princely states lost whatever political capital they may have once enjoyed. This is not the place to explore the reasons for their remarkably sudden decline and fall.[191] What is notable is the widespread consensus that the princely states lacked the ideological orientation and executive apparatus necessary for self-rule. They were described as units of "pure autocracy" that did not possess the political development necessary for immediate empowerment.[192] One member who visited several kingdoms termed their condition as "most miserable" and found that the people lacked any knowledge of electoral politics.[193] Such conditions held little promise.

The support for centralization was not without criticism. It was feared that "too strong a center would result in the center being very oppressive and would in the crushing, so to speak, the liberties and privileges of the people living in component units."[194] The regional units, several members lamented, had been reduced to bodies with

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[190] See Andrew Muldoon, *Empire, Politics, and the Creation of the 1935 India Act* (Surrey: Ashgate, 2009).

[191] See Ian Copland, *The Princes of India in the Endgame of Empire, 1917-1947* (Cambridge: Cambridge University Press, 1997).

[192] Speech by Vallabhbhai Patel, Constituent Assembly of India, 12 October 1949, in *Constituent Assembly Debates* (Volume 10) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), pp. 167-8.

[193] Speech by R. K. Sidhwa, Constituent Assembly of India, 13 October 1949, in *Constituent Assembly Debates* (Volume 10), pp. 179-182.

[194] Speech by Mahomed Sheriff, Constituent Assembly of India, 21 August 1947, in *Constituent Assembly Debates* (Volume 5), pp. 69-70. See also Speech by Kamlapati Tiwari, 23 November 1949, in *Constituent Assembly Debates* (Volume 11), pp. 863-4.

little power or identity.[195] The emergency provisions, it was remarked, were similar to those present in the Weimar Constitution of the Third Reich.[196] One member sharply asked whether the enemy was Pakistan, the Soviet Union, or the people of India itself.[197] Another compared the center's power to redraw regional boundaries to the Earl of Dalhousie's annexation policy.[198] This analogy was sketched out in a deeper way, with supporters of regional autonomy comparing arguments for centralization with those for imperialism. "The old British argument that they must intervene in petty provisional matters", one member noted, "is again being revived and adopted by the very opponents of that argument".[199] Another made the allegation even more starkly: "In the place of foreign imperialism, we are now having an Indian imperialism".[200]

If democracy was to be valued, the argument ran, then regional units ought to be empowered and allowed to learn from their mistakes.[201] It was through the act of self-

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[195] Speech by Mahboob Ali Baig Sahib Bahadur, Constituent Assembly of India, 8 November 1948, in in *Constituent Assembly Debates* (Volume 7), p. 296. See also Speech by K. Hanumanthaiya, Constituent Assembly of India, 8 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 339; Speech by Maulana Hasrat Mohani, 17 October 1949, in *Constituent Assembly Debates* (Volume 10), pp. 432-434; Speech by Bhopinder Singh Man, Constituent Assembly of India, 21 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 721.

[196] Speech by K. V. Kamath, Constituent Assembly of India, 2 August 1949, in *Constituent Assembly Debates* (Volume 9), p. 105.

[197] Speech by Lokanath Misra, Constituent Assembly of India, 5 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 241.

[198] Speech by Rohini Kumar Chaudhari, Constituent Assembly of India, 17 November 1948, in *Constituent Assembly Debates* (Volume 7), pp. 446-447.

[199] Speech by Naziruddin Ahmad, Constituent Assembly of India, 3 August 1949, in *Constituent Assembly Debates* (Volume 9), p. 161.

[200] Speech by P. T. Chacko, Constituent Assembly of India, 21 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 746.

[201] See Speech by K. T. Shah, Constituent Assembly of India, 17 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 438; Speech by Hirday Nath Kunzru, 16 October 1949, in *Constituent Assembly Debates* (Volume 10), pp. 370-371; Speech by T. Prakasam, Constituent Assembly of India, 19 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 702.

government that self-government could be furthered.[202] To centralize, many felt, was to embrace bureaucratic rule rather than representative government.[203] It would take democracy away from regional units and separate the people from those in power.[204] In sum, there was a sense that those who supported centralization regarded adult suffrage "not only with grave suspicion but as a matter of grave danger".[205] This was also the feeling among advocates of village republics, who formed a distinct bloc. These members posited variants of political pluralism, lamenting the rejection of a constitutional framework "built from the bottom".[206]. Ambedkar, one member mourned, knew considerable global history but little about the history of his own nation. To reject the village was to reject a rich democratic tradition.[207] For centuries, the village had been a site of freedom and peace.[208]

In its rejection of these perspectives, the Assembly offered a dark image of the inner corners of the Indian nation. To turn a blind eye to the reality of the regional units

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[202] Speech by Hirday Nath Kunzru, Constituent Assembly of India, 22 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 784.

[203] Speech by Sarangadhar Das, Constituent Assembly of India, 13 October 1949, in *Constituent Assembly Debates* (Volume 10), p. 186.

[204] See Speech by Lokanath Misra, Constituent Assembly of India, 22 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 798.

[205] Speech by H. V. Pataskar, Constituent Assembly of India, 18 November 1949, in *Constituent Assembly Debates* (Volume 10), p. 671; See also Speech by Lakshminarayan Sahu, Constituent Assembly of India, 17 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 614.

[206] Speech by K. Hanumanthaiya, Constituent Assembly of India, 17 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 616.

[207] See Speech by Syamanadan Sahaya, Constituent Assembly of India, 22 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 789.

[208] See Speech by T. Prakasam, Constituent Assembly of India, 22 November 1948, in *Constituent Assembly Debates* (Volume 7), pp. 521-522; Speech by Govind Das, 23 November 1948, in *Constituent Assembly Debates* (Volume 7), pp. 521-522; Speech by B. P. Jhunjhunwala, Constituent Assembly of India, 23 November 1949, in *Constituent Assembly Debates* (Volume 11), pp. 831-834.

was to be "guilty of a grave dereliction of duty".[209] Ongoing events demonstrated the brutal incapacity of regional units. Mired in their petty political battles and administratively handicapped, they were unable to handle the business of government. Consider the frustration expressed by Nehru in a note to Lord Wavell in October 1946, focusing on violence in East Bengal:

> There was the famine three years ago. There was the Calcutta killing two months ago, and there is now this mass slaughter, etc., in Noakhali and the surrounding districts which, if reports are correct, is far worse than the Calcutta killing. Law and special and other responsibilities have no meaning when they become completely incapable of controlling such a situation. But it is also a terrible responsibility for us and we too have to answer before the people of India. What is the good of our forming the Interim Government of India if all that we can do is to watch helplessly and do nothing else when thousands of people are being butchered and subjected to infinitely worse treatment?[210]

In light of this reality, the call for centralization comes across as no surprise. In his defense of emergency powers, Ambedkar posited that it was "only the center which can work for the common end and for the general interests of the country as a whole".[211] Local units would, as it were, think locally. To centralize was to transcend the narrow horizons of the local. It was to commit to a form of uniformity that could rescue Indians from their native confinement. Ambedkar highlighted this in his defense of a unified, integrated judiciary:

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[209] Speech by T. T. Krishnamachari, Constituent Assembly of India, 2 August 1949, in *Constituent Assembly Debates* (Volume 9), p. 122.

[210] Letter from Jawaharlal Nehru to Lord Wavell, 15 October 1946, in *Sardar Patel's Correspondence 1945-50* (Volume 3) (Durga Das ed., Ahmedabad: Navajivan Publishing House, 1973) 183, pp. 183-4.

[211] Speech by B. R. Ambedkar, Constituent Assembly of India, 25 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 977.

> A federation being a dual polity based on divided authority with separate legislative, executive and judicial powers for each of the two polities is bound to produce diversity in laws, in administration and in judicial protection. Up to a certain point this diversity does not matter. It may be welcomed as being an attempt to accommodate the powers of government to local needs and local circumstances. But this very diversity when it goes beyond a certain point is capable of producing chaos and has produced chaos in many federal states. One has only to imagine twenty different laws – if we have twenty states in the union – of marriage, of divorce, of inheritance of property, family relations, contracts, torts, crimes, weights and measures, of bills and checks, banking and commerce, of procedures for obtaining justice and in the standards and methods of administration. Such a state of affairs not only weakens the state but becomes intolerant to the citizen who moves from state to state only to find that what is lawful in one state is not lawful in another.[212]

For Ambedkar, India's villages had supporters "largely due to the fulsome praise bestowed upon it by Metcalfe, who described them as little republics having nearly everything that they want within themselves and almost independent of any foreign relations".[213] Such communities may well have lasted, Ambedkar conceded, but their longevity was hardly indicative of their virtue. He called them "the ruination of India" and referred to the village as "a sink of localism, a den of ignorance, narrow-mindedness, and communalism".[214] "I am glad", he remarked, "that the Draft Constitution has

[212] Speech by B. R. Ambedkar. Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 36.

[213] Speech by B. R. Ambedkar. Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 39.

[214] Speech by B. R. Ambedkar. Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 39.

discarded the village and adopted the individual as its unit".[215] It was centralization that enabled the *individual* to become the unit of organization.

The fear over regional passions is borne out by the Assembly's deliberations on 30 December 1948. On this date, an intense debate ensued over the center's powers with regard to the concurrent list in Schedule VII to the Constitution. This record contained the items that would fall under the joint jurisdiction of the center and regional governments. The contest was over whether the former's powers consisted of the power of legislation or instead extended to the power of execution. By giving the center the power of administration as well as legislation, many argued that the regional governments would have no power at all. Further, it would mean that those impacted by the laws, situated as they might be in far and remote corners, would have to engage with the center rather than with authorities on the ground.[216] The Congress leader T. T. Krishnamachari denied that the inclusion of executive powers would make India a unitary state. Federalism, he observed, had many interpretations, and much would turn on the working of the document.[217] The Constitution, he predicted, would "either become fully federal or partially federal in actual practice over a period of time".[218] More to the point, Krishnamachari argued that experiences under colonial legislation showed that regional

[215] Speech by B. R. Ambedkar. Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 39.

[216] Speech by B. Pocker Sahib Bahadur, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), pp. 1129-1131.

[217] Speech by T. T. Krishnamachari, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 1132.

[218] Speech by T. T. Krishnamachari, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 1133.

governments could often evade responsibility for the execution of laws.[219] The opposition to federal power was "political opposition", by which Krishnamachari meant that it was not a principled disagreement with any feature of the constitutional framework but instead at attempt by different entities at gaining power.[220] He went so far as to assert that "the opposition … has its origin in the fact that the Muslim League never wanted India to be a strong country, with a strong government".[221]

Ambedkar endorsed this historical narrative. The conflict over regional autonomy, in his mind, dated back to the first Round Table Conference in 1930-1931. Here, the center's powers had been limited to accommodate the Muslim League. The League had feared that it would be dominated by Hindu forces at the center, and regional autonomy was an attempt at power-sharing. Ambedkar characterized the acceptance of the Muslim League's position as a "concession" rather than "an acceptance of the principle that the center should have no authority to administer a law passed in the concurrent field".[222] The limitation on the center's powers in Section 126 of the 1935 Act was not founded on any principled rationale. It was therefore improper, Ambedkar argued, to rely on this provision to make the case against central authority. He complained that the Assembly's Muslim members were merely echoing arguments of the Muslim League without being attentive to changed circumstances. He pointed out that the colonial state itself had given

[219] Speech by T. T. Krishnamachari, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), pp. 1133-1134.

[220] Speech by T. T. Krishnamachari, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 1135.

[221] Speech by T. T. Krishnamachari, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 1136.

[222] Speech by B. R. Ambedkar, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 1137.

up its support of Section 126 by enacting Section 126-A. This new provision, introduced prior to the War, allowed the central government to take over the administration of not only concurrent subjects but also those in the provincial list. Even though Section 126-A had been introduced for emergency situations, Ambedkar found it to be equally fitting in ordinary times.[223] What India's Constitution needed was strong central power that could be modulated depending on prevailing circumstances.[224]

Whether or not we find this argument persuasive, the examples Ambedkar used to support his case for central control over the administration of law are striking. His first illustration was a central legislation banning untouchability and imposing penalties on its practice. There might be regions, Ambedkar contended, where such a law would find resistance; regions where the practice of untouchability might attract support. Without central power, such laws would remain unexecuted. Similarly, he offered the example of child marriage, where reform would be impossible without the center's power to enforce its radical legislation. His third example was welfare labor legislation:

> Is it desirable that the labor legislation of the central government should be mere paper legislation with no effect being given to them? How can effect be given to them unless the center has got some authority to make good the administration of laws which it makes? I therefore submit that having regard to the cases which I have cited – and I have no doubt honorable members will remember many more cases after their own experience – that a large part of legislation which the center makes in the concurrent field remains merely a paper legislation, for the simple reason that the center cannot execute its own laws.[225]

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[223] Speech by B. R. Ambedkar, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 1138.

[224] See Speech by B. R. Ambedkar, Constituent Assembly of India, 4 November 1948, in *Constituent Assembly Debates* (Volume 7), pp. 34-35.

[225] Speech by B. R. Ambedkar, Constituent Assembly of India, 30 December 1948, in *Constituent Assembly Debates* (Volume 7), p. 1140.

By locating authority at the center one could therefore rule against the grain of a backward society. To distance power from local actors meant that power could be exercised progressively. The state itself, it was almost assumed, would have no ideological predisposition to satisfy, and it would commit itself to secure the welfare of its citizens. To accept such a model of statehood, it was moreover suggested, was to be on the side of the future. Global trends, the Assembly claimed, favored centralization. Even though it seemed like Soviet Russia empowered local units, in truth it was state was "maintained through the rigid and ruthless discipline of the community party".[226] In the United States, the Supreme Court had come to interpret the general welfare and trade and commerce clauses widely, thereby strengthening the center.[227] After the Great Depression, American law had slowly brought agriculture, education, and industry all under centralized control.[228] In both Canada and Australia, governmental commissions had underlined the role of increased central power.[229] In late 1949, the Deputy Prime Minister wrote to the Provincial Premiers, encouraging them to accept this new state of

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[226] Speech by Balkrishna Sharma, Constituent Assembly of India, 21 August 1947, in *Constituent Assembly Debates* (Volume 5), p. 77. In a description of the Soviet Union Constitution in 1928, Nehru had noted the sovereign character of the republics forming the Union but recognized that "The Communist Party, although it has apparently no official status in the constitution is really a pillar of the Soviet regime". Jawaharlal Nehru, "The Constitution of U.S.S.R.", 24 May 1928, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 2) (S. Gopal ed., New Delhi: Orient Longman, 1974) 395, p. 397.

[227] Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 8 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 335.

[228] See Speech by K. M. Munshi, Constituent Assembly of India, 16 June 1949, in *Constituent Assembly Debates* (Volume 8), pp. 927-928.

[229] See Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 23 November 1949, in *Constituent Assembly Debates* (Volume 11), pp. 838-839.

affairs. Prior notions of regional autonomy, he observed, "have become out of date".[230] The world had become a smaller place but its shrunken character was invisible to narrow, local eyes.

V

When framed as a contest between the state and society, one can see the underlying orientations that fashioned the call for centralization. Supporters of the modern centralized state saw their opponents as sharing a faith in Indian society. Even those who desired state-centered regional governments rather than political pluralism were seen to carry this conviction, for the boundary between the state and society became porous as political authority traveled downward. The equivalence between regional state authority and pluralism is in fact of some importance. To understand this equivalence, we cannot simply record the support for a state over other kinds of associations. This inquiry must be followed by a subsequent one – namely, an understanding of which entities were regarded as appropriate for *becoming a state*. An account of how to make a state is less a question for political theory and more a matter of political sociology. It rests on an account of which bodies are capable of existing as states in the first place. For the founders, regional territories simply could not become states. That is to say, they could not construct a force that could counteract the tenacity of local cultural forms. This is

[230] Vallabhbhai Patel, Letter to All Provincial Premiers, 3 November 1949, in *Sardar Patel's Correspondence 1945-50* (Volume 8) (Durga Das ed., Ahmedabad: Navajivan Publishing House, 1973) 386, p. 394.

neither a trivial point of political sociology nor an odd fact limited to India. It is grounded in the notion that subordination itself dictates certain attitudes.

India's political pluralists were, as we have noted, part of a global movement that either decentered the state or rejected it altogether. The Indian pluralists shared a great deal with their foreign partners: they denied the singularly of the state and offered historical and sociological rather than logical explanations for the meaning of authority.[231] They also shared the same fate as pluralists elsewhere. Despite its astonishing reach, the effort to reject state sovereignty was a momentous failure and the story of the twentieth century became, in many ways, the story of the victory of the nation-state. The failure of Indian political pluralism was neither a contingent consequence of Indian politics nor a result of factors unique to the Indian brand of this ideology. It was an outcome shaped by the internal logic of pluralism. The case for non-hierarchical arrangements struggled to elucidate how authority was coordinated in such settings, and similarly struggled to show how the conditions for freedom would emerge.[232]

As scholars of pluralist thought have pointed out, this struggle exposed the internal limitations within political theory. The entire pluralist point was the terms of order should emerge organically as a matter of history and sociology rather than be determined ex ante as a matter of logic.[233] But for figures like Ambedkar and Nehru, as was the case with Thomas Hobbes, this prospect was a terrifying one. Hobbes had

[231] On these features of political pluralism, see Runciman, *Pluralism and the Personality of the State*.

[232] On the general failure of Gandhian thought to demonstrate its feasibility, see Chatterjee, *Nationalist Thought and the Colonial World*, pp. 117-125.

[233] See Runciman, *Pluralism and the Personality of the State*.

famously argued that society lacked any unity that preceded the existence of the state. It was precisely for this reason that Hugo Grotius's double contract theory, where society created an association prior to the institution of government, was seen as mistaken. Ambedkar and Nehru did not always fear cycles of violence – their concerns were broader than the bare preservation of order – but they were consistently doubtful of society's internal capacity to reconstitute interpersonal relations. The pluralist schema may not result in disarray, but it was seen to purchase stability at the price of individual freedom. Pluralism did not wholeheartedly defend the structures of social life, but it had no conceptual resources for their change. Similarly, it did not support unmitigated conflict, but it had no conceptual resources for its prevention.[234] In Gandhi's anti-statist stance, there was no rational account of how to preserve the peace; in Mukerjee's imagery of the state as one actor among many, little light was shed on how the boundary between the state and other actors would be policed. It was simply asserted – as a fact of historical sociology – that the Indian village had usually managed to resolve its problems. The past was a marker of harmony rather than antagonism.

Ambedkar and Nehru spoke of a different past, of course, but fundamental to their contrasting mural was a different conceptual story. Unlike what many alleged, their point was hardly that India should imitate Western industrialization and casually embrace foreign frameworks for state formation. The pluralists, both in India and elsewhere, presented a powerful critique of Western modernity. But their failure lay in a theoretical incapacity to offer alternative institutional models that could solve the problems for

[234] It is hardly surprising, therefore, that some critics of pluralism found it inapplicable to societies that lacked a background consensus and an already existing degree of tolerance and civility. See Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven: Yale University Press, 2013), pp. 53-54.

which the state, an impersonal authority with its own logic, had been constructed. This was partly because they supposed that there was no such problem to solve – they had a contrasting notion of society and the freedom that it allowed – and partly because they thought that the domain of the social could resolve whatever flaws it had. For Ambedkar and Nehru, however, Indian society was in desperate need of change, and the change that was required was too severe to take place from within. One could not respond to the drama and tragedy of the social world by suggesting, in either historical or sociological terms, that it might sort itself out. Instead, one needed some account of how reform would occur. The chaos and violence in the final years of colonial rule offered very little promise for civility, and reinforced fears about the structures of domination and layers of prejudice that pervaded society. These years delivered facts that were in search of a theory. The only *theory* on offer was the theory of the state.

It is worth noting, without pursuing the point in any great detail, that political pluralism was not the only ideology to have seen defeat. There were other losses on the left. Notable among them was the communist agenda, exemplified by the marginalization of figures like Manabendra Nath Roy.[235] A prominent actor in the 1920s, Roy would later join the Congress but have hardly any impact on its ideology, create his own party but achieve little political success, and eventually – with the birth of the new republic – initiate a new humanist movement.

[235] Others that merit mentioning are Subhas Chandra Bose, whose notion of centralized state power focused on nationalism and socialist reconstruction, and Rammanohar Lohia, who argued against a large state and made the case for a balance between urban and rural life. See, as merely indicative of their thought, Subhas Chandra Bose, Presidential address at the Fifty-First Session of the Indian National Congress, February 1938 in *Netaji Collected Works* (Volume 9, Sisir Kumar Bose and Sugata Bose eds., Delhi: Permanent Black, 1995) 3, p. 16; Rammanohar Lohia, *Marx, Gandhi and Socialism* (Hyderabad: Navahind, 1963).

From his earliest writings, Roy underlined the class composition of society. Feudalism, he argued in his 1922 work *India in Transition*, no longer characterized Indian power relations. The emerging nationalist movement, Roy suggested, was a bourgeoisie effort to further its economic condition. Political opposition to British rule arose from both capitalists, who sought to control resources and labor, and the poor, who desired material improvements in standards of living. Even though both groups joined forces to end foreign rule, Roy cautioned against seeing them as one. It would be a mistake to confuse elite capitalist anxiety with mass struggle; and to commit such a mistake would blind one to the exploitative character of capitalism. He sketched out this exploitation in vivid terms:

> The secret of the misery of the rural population lies in the fact that the agricultural production of India has been bright completely within the sphere of capitalist exploitation, foreign and native combined. The unrestricted export of foodgrains, together with the merciless speculation carried on by the native traders, raises the price continually on the one hand, while on the other, the lack of employment among an ever-growing section of the rural population creates great scarcity of money. So, even when there is food the people die of hunger because they have no money to buy it with.[236]

Roy rejected the solutions on offer at the time – the capitalist strategy of increasing production; the "bourgeois nationalist program" of granting largest capitalists ownership rights and reducing their tax burden; and the "petty-bourgeois liberal reformism" that wanted to end large holdings and keep industry within the domain of small farmers.[237] He

[236] Manabendra Nath Roy, *India in Transition*, 1922, in *Selected Works of M. N. Roy* (Volume 1) (Sibnarayan Ray ed., New Delhi: Oxford University Press, 1987) 183, p. 220.

[237] Roy, *India in Transition*, p. 221.

saw the roots of the rural population's crisis in British land tenure and revenue collection policies. The *zamindari* system had devastating consequences for tenants, who had no defense against excessive rent collection. The Indian peasant was caught between foreign and domestic capitalist exploitation; and regardless of whether the two groups combined or clashed, it was the peasant who suffered. The only remedy, in Roy's mind, was a wholesale agrarian revolution.

For Roy, class struggle was the appropriate frame for understanding India's situation. He rejected "radical religionists with strong national jingoism" whose mantra was Indian exceptionalism, as well as "class-conscious modern bourgeoisie with liberal tendencies" whose nationalism led to a diffused vision of social struggles.[238] Peasant conflicts cut across religion and other social divisions. Importantly, caste – that special Indian institution – too had its origins in economic factors. The emphasis on class was part of the broader claim that capitalism had arrived in India, and that ongoing and future transformations in India were part of the story of capitalist exploitation. This broader claim was a challenge to both imperial and nationalist versions of Indian history. By offering a new account for the factors that contributed to change and the emergence of the Indian nation, Roy was both affirming collective agency but denying that such agency was always present. This analysis offered a fresh explanation for colonial rule: such rule was a consciously ruthless marriage between the British and local trading classes.

Much has been said about Roy's failure to appreciate the nationalist movement, and how his presuppositions locked him into conclusions that were divorced from

[238] Roy, *India in Transition*, pp. 251-252.

reality.[239] For Roy, the structure of Indian and Western society was identical, and India was fated to follow the same historical path as other nations.[240] We need not expand on the implications that Roy's ideological commitments had for his political career. But it bears mention that, even in the face of his evolving beliefs, Roy put forth a theory of change that took modernization to its logical conclusion. His eventual proposal was for radical participation, with people's committees at multiple tiers, and the prevention of forms of representation, which in typical communist terms he regarded as forms of domination.[241] Each brand of Indian political thought presented new ways of upsetting the status quo, and Roy's radicalism short-circuited the path to modernity. His sidelining is an important fact of intellectual history for it draws attention to the non-instrumentalist facet of Ambedkar's and Nehru's statist commitment. Both men cared a great deal about modernization, but both saw the achievement of economic growth as insufficient. To live under conditions of freedom was as much about effectuating change through a set of procedures and practices that constituted the reality of self-rule. For the state to perform an action differently would result in a different action being performed. It was integral to the inter-subjectivity that the state promised that its actions would be constituted in

[239] For a thoughtful study of Roy's limitations, see Sudipta Kaviraj, "The Heteronomous Radicalism of M. N. Roy" in *Political Thought in Modern India* (Thomas Pantham and Kenneth L. Deutsch eds., New Delhi: Sage Publications, 1986) 209. Roy's political failures should not take away from the disparate and remarkable set of global conversations and movements in which he was involved. See Kris Manjapra, *M. N. Roy: Marxism and Colonial Cosmopolitanism* (New Delhi: Routledge, 2010).

[240] See Manabendra Nath Roy, "Bourgeois Nationalism", 15 August 1923, in *Selected Works of M. N. Roy* (Volume 2) (Sibnarayan Ray ed., New Delhi: Oxford University Press, 1988) 125.

[241] See Manabendra Nath Roy, *Constitution of Free India* (Delhi: Radical Democratic Party, 1944). See also Manabendra Nath Roy, "Constituent Assembly", February 1928, in *Selected Works of M. N. Roy* (Volume 3) (Sibnarayan Ray ed., New Delhi: Oxford University Press, 1990) 143, pp. 147-148; Spratt, *India and Constitution Making*, pp. 73-74.

particular ways.[242] Indeed, both men held that the mechanisms of constitutional government and parliamentary democracy mattered in and of themselves. In their mind, India needed democracy and it needed modernity – and democracy and modernity needed one another.

[242] On the normativity of public law, see generally Alon Harel, *Why Law Matters* (New Delhi: Oxford University Press, 2014).

4

The Idea of Citizenship

I

Of the many reasons offered against self-government in India, few seemed as compelling as the challenge posed by diversity. A multi-ethnic polity was seen to threaten collective political life. Such diversity, John Stuart Mill had feared in the *Considerations on Representative Government*, would engender mutual jealousy between different communities.[1] From the contrasting historical efforts of James Mill and Mountstuart Elphinstone to the ethnographic agenda of Herbert Hope Risley, the imperial mind had long imagined Indian society to be a constellation of groups.[2] The individualized stance of democratic life was seen as unsuitable to a land so thoroughly constituted by communities. Freedom, as it played out during the Raj, was a concept that did not gesture at individuals. The identity of groups had in fact assumed such profound meaning during the final decades of colonialism that the political history of this period could well be told through this lens.

As the objective of Indian nationalism advanced from greater political voice to complete independence, the negotiation of diversity marked a major theme in the developing constitutional imagination. Representation was regarded as the trickiest

[1] John Stuart Mill, *Considerations on Representative Government* (New York: Cambridge University Press, 2010 [1861]), pp. 294-304.

[2] James Mill, *The History of British India* (New York: Cambridge University Press, 2010 [1817]) (3 volumes); Mountstuart Elphinstone, *The History of India* (New York: Cambridge University Press, 2013 [1841]) (2 volumes); H. H. Risley, *The People of India* (London: W. Thacker, 2nd edn., 1915).

problem facing Indian democratization, and it proved to be most challenging in the case of Muslims and the lower castes. This chapter considers how the Founders approached the challenge in each instance. In mediating citizenship through community affiliation, the colonial state embraced a particular vision of participation. Representation assumed a static orientation and interests were established in advance. The purpose of representation was articulation rather than transformation – it was to understand the composition of society and to reflect that composition. Efforts at increasing participation, such as they were, saw participation as the negotiation and management of preset interests. Different communities contended with one another under the auspices of their colonial masters, and each community was seen as having predetermined preferences. Partition tore apart established modes of political understanding, and the event's occurrence alongside the introduction of universal adult franchise reopened the question of representation. The moment brought attention to the meaning of participation in a self-governing polity. The challenge posed by caste was also reexamined, and brought to light a distinct set of normative considerations.

This chapter proceeds in three stages. First, it uncovers the wide-ranging failures in theories of political representation in the years before Independence. It then turns to the Constituent Assembly's decision to discard communal representation in favor of the individualization of identity. Finally, it considers the difficulty posed by caste, and shows how the Framers' orientation toward caste may be understood in light of their overall vision of citizenship.

II

A conspicuous feature of Indian political thought in the years prior to the end of colonial rule was the absence of a developed conception of representation that was free from communal affiliations. Whether one attends to the intellectual orientation of major Muslim leaders, key actors within the Indian National Congress, or Hindu nationalists, one encounters either resistance to the question of representation or little attempt to picture a polity centered on individual freedom. Many thinkers appear to have been condemned to colonial categories in thinking about citizenship under conditions of diversity. For others, identities imposed by the colonial state were escaped by denying that representation posed any real problem. These failures, in which some of India's most progressive and serious minds were complicit, marked a profound crisis over representation. It was a crisis brought into sharp focus by the partition of British India in 1947, and it was this terrifying event that eventually paved the way for non-communal representation within India's constitutional imagination.

One might begin to study this crisis by considering the case of Muslim representation. Here historical attention has focused, understandably so, on the division of territory in 1947. According to one strand of scholarship, the Muslim League leader Muhammad Ali Jinnah's principal objective was authority at the center after the departure of British rule.[3] His political competition, such scholarship has shown us, was not merely the Indian National Congress but also provincial Muslim leaders. A scheme with a weak center and strong provinces would have left Jinnah as a national leader

[3] See Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League, and the Demand for Pakistan* (Cambridge: Cambridge University Press, 1985).

without real power. In contrast, an arrangement organized around a strong central government would have kept Jinnah subordinate to the Congress, whose strength lay in numbers. A body of scholarship claims that it was in response to both possibilities that Jinnah sought a strong center where Muslims would be treated on par with Hindus. The claim of parity, through the framing of Muslims as a separate nation, could move beyond the uncompromising logic of majority rule.

In light of this context, scholars view the Lahore Resolution of 1940, in which Jinnah notably expressed the demand for Pakistan, "as a bargaining counter".[4] This strand of reasoning sees the Resolution as having "the merit of being acceptable (on the face of it) to the majority-province Muslims, of being totally unacceptable to the Congress and in the last resort to the British too".[5] It places emphasis on Paragraph 4 of the Resolution, suggesting that the use of the word "constitution" rather than "treaty" shows Jinnah's commitment to a united India.[6] This interpretation further notes that the statement mentioned neither "partition" nor "Pakistan".[7] A reading of this kind presents the Resolution as a *reductio ad absurdum* of the call for provincial autonomy by local Muslim leaders. It was a strategy through which the British and the Congress would be forced to concede the demand for a strong center.

[4] Jalal, *The Sole Spokesman*, p. 57.

[5] Jalal, *The Sole Spokesman*, p. 57.

[6] Jalal, *The Sole Spokesman*, p. 60.

[7] Jalal, *The Sole Spokesman*, p. 58.

A different reading of Partition underlines reasons that were internal to Islam.[8] This line of study focuses on normative religious constraints that guided Muslim political action. Even though colonial policies played their part in constructing Indian society along communal lines, scholars contend that Muslims leaders had further limitations in the forms of representation that they could embrace. In particular, the idea of a community had salience within Islam, and this led a host of disparate Muslim leaders – from Syed Ahmed Khan and Amir Ali to Maulana Muhammad Ali and Muhammad Iqbal to Jinnah – to draw a link between political commitment and religious faith. Jinnah could claim to be the sole spokesman for India's Muslims "not only because therein lay the political secret of his and his party's undisputed claim to power", but also because doing otherwise would mean to "reject the very sources of his own and his party's legitimation".[9] A Muslim consensus is seen as having imposed divine considerations: it required more than legitimacy through numbers and individual representation was rejected along with majority rule. The special feature of separate electorates and the demand for parity was not merely that it treated Hindus and Muslims as groups with equal power, but that it embodied the idea of exclusivity.[10]

This debate has been performed in multiple iterations. A recent intervention, for example, has surveyed Muslim activity in the United Provinces of Agra and Oudh to dispute the claim that Pakistan was an inchoate proposal that inadvertently succeeded. Rather than simply being a home for Indian Muslims, it is shown that Pakistan was

[8] See Farzana Shaikh, *Community and Consensus in Islam: Muslim Representation in Colonial India*, 1860-1947 (Cambridge: Cambridge University Press 1989).

[9] Shaikh, *Community and Consensus in Islam*, p. 6.

[10] Shaikh, *Community and Consensus in Islam*, p. 195.

imagined "as an Islamic utopia that would be the harbinger for renewal and rise of Islam in the modern world", secure the Islamic global community, and be "a worthy successor to the defunct Turkish Caliphate as the foremost Islamic power in the twentieth century".[11] The assertion that the Pakistan proposal lacked serious reflection on the part of India's Muslims is seen as one far too easy to make. This contribution points out that if the scheme was indeed under-theorized, then the burden is to show how it became a call for an independent sovereign state.

The scholarship on Partition is considerable in volume and detail. However, as the abovementioned contributions help us notice, the historical focus has been on *territoriality*. The matter of *representation* has simply been subsumed within, and conflated with, the study of territoriality. The political importance of Partition, to say nothing of the drama and horror it involved, makes the interest in it reasonable. It is only natural to ask why Britain ruled one territory only to leave behind two independent sovereign states. But understandable as the blurring of both matters might be, territoriality and representation are analytically distinct, and the untying of both is crucial for an understanding of the crisis of representation during India's early-to-mid twentieth century.

By turning our attention to representation, we can see that interpretive doubts over Jinnah's real intentions lose their relevance. Even if it is true that "Jinnah was keeping his options open for a constitutional arrangement which would cover the whole of India",[12]

[11] Venkat Dhulipala, *Creating a New Medina: State Power, Islam, and the Quest for Pakistan in Late Colonial North India* (Delhi: Cambridge University Press 2015), p. 4.

[12] Jalal, *Sole Spokesman*, p. 59.

that the Resolution of 1940 was an "incomplete and contradictory statement"[13] and that Jinnah was agreeable to the idea of an undivided country, it is incontrovertible that he saw Hindus and Muslims differently. "The problem of India", he observed, "is not of an inter-communal character but manifestly of an international one".[14] He stated that "the only course open … is to allow the major nations separate homelands by dividing India into 'autonomous national states'".[15] Whatever argument one may make about Jinnah's interest in the territorial division of British India, he made his belief in the distinction between Hindus and Muslims clear:

> It is extremely difficult to appreciate why our Hindu friends fail to understand the real nature of Islam and Hinduism. They are not religions in the strict sense of the world, but, in fact, different and distinct social orders and it is a dream that the Hindus and Muslims can ever evolve a common nationality, and this misconception of one Indian nation has gone far beyond the limits and is the cause of most of our troubles and will lead India to destruction if we fail to revise our notions in time. The Hindus and Muslims belong to two different religious philosophies, social customs and literature. They neither intermarry, nor interdine together and, indeed, they belong to two different civilizations which are based mainly on conflicting ideas and conceptions. Their aspects on life and of life are different. It is quite clear that Hindus and Muslims derive their inspiration from different sources of history. They have different epics, their heroes are different, and different episodes. Very often the hero of one is a foe of the other and, likewise, their victories and defeats overlap. To yoke together such nations under a single state, one as a numerical minority and the other as a majority, must lead to growing discontent and final destruction of any fabric that may be so built up for the government of such a state.[16]

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[13] Jalal, *Sole Spokesman*, p. 59.

[14] Mohammad Ali Jinnah, Presidential Address at the Twenty-Fifth session of the All-India Muslim League, 22 March 1940, in *Quaid-i-Azam Mohammad Ali Jinnah Papers* (Third Series, Volume 15) (Z. H. Zaidi ed., Islamabad: Government of Pakistan, 2007) 211, p. 222.

[15] Jinnah, Presidential Address, p. 223.

[16] Jinnah, Presidential Address, p. 223.

Even prior to his 1940 address, from which the above extract is drawn, Jinnah wrote to Mohandas Karamchand Gandhi declaring India to be neither a nation nor a country.[17] He saw it as "a sub-continent composed of nationalities, Hindus and Muslims being the two major nations".[18] The difference between Hindus and Muslims was borne out by a volatile exchange he shared with Gandhi in 1944. Both Hindus and Muslims, he asserted, "are two major nations by any definition or test of a nation".[19] In matters ranging from "culture and civilization" to "art and architecture" to "customs and calendar", etc., Muslims had their own "distinctive outlook on life and of life".[20] For Jinnah, the claim for a sovereign state was not a form of "severance or secession from any existing Union".[21] Such an alleged Union was "*non est factum* in India"; Muslims were making the claim on the basis of the fact that they were already a nation.[22]

If our interest is in representation, we may in fact chart a reasonably consistent course of thinking that runs all the way back to Syed Ahmed Khan. The most important Muslim intellectual in India in the nineteenth century, Khan was committed to

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[17] Mohammad Ali Jinnah, Letter to Mohandas K. Gandhi, 21 January 1940, in *Quaid-i-Azam Mohammad Ali Jinnah Papers* (Third Series, Volume 15) (Z. H. Zaidi ed., Islamabad: Government of Pakistan, 2007) 75, p. 76.

[18] Jinnah, Letter to Gandhi (21 January 1940), p. 76.

[19] Mohammad Ali Jinnah, Letter to Mohandas K. Gandhi, 17 September 1944, in *Quaid-i-Azam Mohammad Ali Jinnah Papers* (Second Series, Volume 11) (Z. H. Zaidi ed., Islamabad: Government of Pakistan, 2005) 163, p. 164.

[20] Jinnah, Letter to Gandhi (17 September 1944), p. 164.

[21] Mohammad Ali Jinnah, Letter to Mohandas K. Gandhi, 21 September 1944, in *Quaid-i-Azam Mohammad Ali Jinnah Papers* (Second Series, Volume 11) (Z. H. Zaidi ed., Islamabad: Government of Pakistan, 2005) 170, p. 172.

[22] Jinnah, Letter to Gandhi (21 September 1944), p. 172.

reconciling Islam with modernity.[23] He turned his attention to politics in the aftermath of the 1857 revolt, and, in *The Causes of the Indian Revolt*, offered an explanation for the uprising.[24] Khan pushed against a religious interpretation of the event, claiming instead that the dissatisfaction arose from the absence of Indian participation in the governance of its people. Indians ought to have been included in the Legislative Council, and this singular fact was "the origin of all the troubles that have befallen Hindustan".[25]

Khan stressed the state's ignorance and apathy as well as prevailing misapprehensions about its real intentions. In several contexts, there was the fear of state intervention. With regard to religion, for instance, the behavior of Missionaries, who preached in public spaces and "attacked the followers and the holy places of other creeds", was at odds with local Hindustani practices where one "preaches and explains his views in his own mosque, or his own house".[26] Khan portrayed how local Indians reacted with fear and concern to laws that had been enacted without their involvement. From regulations relating to widow remarriage to the transfer of property to revenue collection, he identified social norms that had been upset by legal developments. The case for greater Indian representation rested in part on social differences between the English and Indians. History was a reminder of the "differences and distinctions that have existed between the manners, and opinions, and the customs of the various races of

[23] See Peter Hardy, *The Muslims of British India* (Cambridge: Cambridge University Press, 1972), pp. 94-104.

[24] Syed Ahmed Khan, *The Causes of the Indian Revolt* (Karachi: Oxford University Press, 2000 [1873]).

[25] Khan, *The Causes of the Indian Revolt*, p. 13.

[26] Khan, *The Causes of the Indian Revolt*, p. 18.

men".[27] For Khan, it was "to these differences of thought and custom that the laws must be adapted, for they cannot be adapted to the laws".[28] It was a disregard of local customs and practices – a disregard for the peculiar practices of the Indian race – which led to the revolt.

The Causes of the Indian Revolt was not significant for any claim pertaining to self-government. The interaction between the governing and governed that Khan desired was advisory in nature. But what was noteworthy was the text's emphasis on the Muslim community – on their unique predicament and condition. Although parts of *The Causes of the Indian Revolt* were written in general terms, and English rulers were compared with their Indian subjects, Khan repeatedly identified how the Muslim community had especially suffered. Interference in religious matters, for example, had affected Muslims far more than Hindus, for the reason that "the Hindu faith consists rather in the practice of long established rites and forms, than in the study of doctrine".[29] Unlike Hindus, who "recognize no canons and laws", Muslims view "tenets of their creed as necessary to salvation".[30] Khan also noted that strict rules regarding employment were particularly burdensome for Muslims. The Hindus, who were "original inhabitants" of the land, "were never in former days in the habit of taking service".[31] Instead, "they were engaged in such work as their forefathers had been engaged in before them".[32] The Muslims, on the

[27] Khan, *The Causes of the Indian Revolt*, p. 12.

[28] Khan, *The Causes of the Indian Revolt*, p. 12.

[29] Khan, *The Causes of the Indian Revolt*, p. 23.

[30] Khan, *The Causes of the Indian Revolt*, p. 23.

[31] Khan, *The Causes of the Indian Revolt*, pp. 34-5.

[32] Khan, *The Causes of the Indian Revolt*, p. 35.

other hand, "came in the train of former conquerors and gradually domesticated themselves in India".[33] This led to their dependency on service and placed them at greater inconvenience than Hindus.[34] Another instance was the temper and lack of courtesy displayed by officials towards natives, which was especially offensive to Muslims given their historical place in India and the premium they placed on honor. The "advancement of their honor in the eyes of the world", which they eagerly sought, was further affected by local absence in high appointments.[35]

Through examples such as these, Khan portrayed Muslims as a community. In the intellectual life of the nineteenth century, he contributed greatly in challenging the orthodox and in underscoring the importance of modern education. His interventions were noteworthy from the perspective of social reform, but they had the additional consequence of politicizing Muslims. Khan himself, in later years, was "convinced that no part of India has yet arrived at the stage when the system of representation can be adopted, in its fullest scope, even in regard to local affairs".[36] He saw India as a country of many races, where larger communities would overrun smaller ones. In the Muslim League's 1906 inaugural session, much tribute was paid to Khan and his role in making India's Muslims aware of their separate interests was acknowledged.[37] Muslims were

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[33] Khan, *The Causes of the Indian Revolt*, p. 35.

[34] Khan, *The Causes of the Indian Revolt*, p. 35.

[35] Khan, *The Causes of the Indian Revolt*, p. 44.

[36] Syed Ahmed Khan, Speech on the Central Province Local Self-Government Bill of 1883, 12 January 1883, in *Writings and Speeches of Sir Syed Ahmed Khan* (Shan Mohammad ed., Bombay: Nachiketa Publications, 1972) 153, p. 156.

[37] See Speech by Viqar-ul-Mulk, Inaugural Session of the All-India Muslim League, 30 December 1906, in *Foundations of Pakistan* (Volume 1) (Syed Sharifuddin Pirzada ed., New Delhi: Metropolitan Book Co., 1982) 2 at 3-4; Speech by Nawab Salim-ul-lah, Inaugural Session of the All-India Muslim League, 30

only a fifth of India's population. With the end of British rule, they would be ruled by a population four times their size. In such a situation, a speaker at the inaugural session feared, "our life, our property, our honor, and our faith will all be in great danger".[38]

Khan's idea of Muslims as a community, whose fate was somehow distinct from the fate of others, proved to have astonishing staying power amid changing views on how their interests should be secured. Interestingly enough, one might even enlist Abul Kalam Azad in the category of Muslims thinkers who adopted such a stance. Azad, a prominent Congress leader and a minister in Jawaharlal Nehru's independent government, is typically cast as the mirror image of Jinnah. He is the Muslim figure who stayed committed to the Congress and fought to keep India undivided. But though his differences with Jinnah on the division of British India are clear, it is less certain whether he fully endorsed a theory of citizenship that was unmediated by religion.

As has been shown, Azad's early writings, such as those in the journal *Al-Hilal*, depict religion to be central to his political thought. For him, religion was the motivation for Muslim resistance to foreign rule, and it was the foundation for a political community.[39] A recent exploration of Azad's early thought has rightly characterized him as "a staunch Indian patriot and at the same times perhaps the most celebrated theorist of a trans-national *jihad*".[40] His call for Hindu-Muslim unity should not, we are reminded,

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December 1906, in *Foundations of Pakistan* (Volume 1) (Syed Sharifuddin Pirzada ed., New Delhi: Metropolitan Book Co., 1982) 6, pp. 7-10.

[38] Viqar-ul-Mulk, Inaugural Session of the All-India Muslim League, p. 4.

[39] Peter Hardy, *Partners in Freedom and True Muslims: The Political Thought of Some Muslim Scholars in British India 1912-1947* (Sweden: Studentlitteratur, 1971), pp. 21-23.

[40] Ayesha Jalal, "Striking a Just Balance: Maulana Azad as a Theorist of Trans-National *Jihad*", 4 *Modern Intellectual History* 95 (2007), p. 96.

be confused with secularism.[41] Azad broke with traditional Muslim opinion in two important respects. First, he challenged the *ulama's* interpretation of *sharia*. He believed the *ulama* to have been corrupted over time by their proximity to those holding political power.[42] Second, his notion of a political community, founded on a shared commitment to Islam, had a place for a non-Muslims and had a vision for Muslim and non-Muslim cooperation.[43] In fact, as Hardy captures, the call for Hindu-Muslim unity in *Masla-i Khilafat* is explicitly based upon a reading of *sharia*, which he believes permits collaboration between both communities.[44] What Azad did was grant the *sharia* moral authority without insisting on that authority being back by a coercive legal regime.[45]

In his 1940 presidential address to the Indian National Congress, Azad delivered an impassioned plea for India's unity. He saw "India's historic destiny" to be "that many human races and cultures and religions should flow to her, finding a home in her hospitable soil, and that many a caravan should find rest there".[46] Yet this defense of territorial unity did not proceed alongside a common vision of citizenship. Azad referenced his writings in *Al-Hilal*, stating that there had been no change in his views over the course of nearly three decades. He asserted his "special interest in Islamic

[41] Jalal, "Striking a Just Balance", p. 106.

[42] Hardy, *Partners in Freedom*, p. 22.

[43] Hardy, *Partners in Freedom*, pp. 22-23. See also Jalal, "Striking a Just Balance", pp. 105-107.

[44] Hardy, *Partners in Freedom*, pp. 28-29, 39-42.

[45] Hardy, *Partners in Freedom*, pp. 30-31.

[46] Maulana Abul Kalam Azad, Presidential Address at the Fifty-Third Session of the Indian National Congress, 19 March 1940, in *The Selected Works of Maulana Abul Kalam Azad* (Volume 1) (Ravindra Kumar ed., New Delhi: Atlantic, 1991) 96, p. 113.

religion and culture" and declared that he "cannot tolerate any interference with them".[47] "The spirit of Islam", he contended, did not interfere with his political aspirations or in his partaking of "the indivisible unity that is Indian nationality".[48]

In this address, Azad acknowledged both the existence and significance of the communal problem. But he felt that it ought not to come in way of Indian freedom. The first reason for this was the Congress proposal for minority protection, which would offer "the fullest guarantee … for the rights and interests of minorities" and empower minorities to "judge for themselves what safeguards are necessary for the protection of their rights and interests".[49] The second reason was specifically addressed to the Muslim community. The community, he lamented, had fallen prey to invidious colonial machinations and wrongly imagined itself to be a minority. In the world of politics, Azad argued, a minority could not simply be defined as a group that was numerically smaller in size in comparison with a larger group. More substantially, it related to one "that is so small in number and so lacking in other qualities that give strength, that is has no confidence in its own capacity to protect itself from the much larger group that surrounds it".[50] India's Muslim population could not be regarded as a minority under such a definition. Its size was significant and its internal divisions were few. India's future constitutional schema would be based on provincial autonomy with a limited role for the

[47] Azad, Presidential Address, pp. 112-113.

[48] Azad, Presidential Address, p. 113.

[49] Azad, Presidential Address, p. 107.

[50] Azad, Presidential Address, p. 109.

central authority. He reiterated this federal proposal in later writings.[51] Such a scheme would give Muslims institutional freedom and thereby offer them no cause for worry.

Azad's political thought does not disclose a neat theory of differentiated citizenship, and it would be wrong to suggest as such. But it is interesting that his composite nationalism and belief in a united India did not necessarily go hand in hand with a theory of representation that transcended community lines. His vision of territorial unity proceeded alongside his religious commitments. In 1946, for instance, he referred to the division of British India as "un-Islamic".[52] Azad's complex views highlight the importance of distinguishing between territoriality and representation; they emphasize the need to draw a difference between those seeking unity or division and those holding a communal or non-communal view of representation. Departing from standard historical accounts, a similarity between Azad and Jinnah was once provocatively drawn, suggesting that they both offered a similar proposal to maintain India as a single territorial state.[53] One may well approach this analogy from the opposite direction, to argue that neither offered a theory of representation that focused on individual liberty. Azad's views confirm that the overwhelming focus on territoriality is, in some sense, an intellectual distraction. Indeed, the territorial claim for Pakistan was a kind of contradiction in terms, for it sought a separate homeland on the basis of a global religious movement that claimed to transcend the nation-state.[54]

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[51] See Maulana Abul Kalam Azad, *India Wins Freedom* (New Delhi: Orient Longman, 1988), p. 147.

[52] Maulana Abul Kalam Azad, Statement on Partition, 15 April 1946, in *The Selected Works of Maulana Abul Kalam Azad* (Volume 11) (Ravindra Kumar ed., New Delhi: Atlantic, 1992) 132, p. 132.

[53] Ayesha Jalal, "Azad, Jinnah and the Partition", 24 *Economic and Political Weekly* 1159 (1989).

[54] See Faisal Devji, *Muslim Zion: Pakistan as a Political Idea* (Cambridge: Harvard University Press 2013).

If a theory of non-communal representation was found missing among Muslim leaders, it is not clear that figures like Nehru and Gandhi fared considerably better. To be sure, both leaders – and the Indian National Congress – rejected communalism and resisted the form of politics that it promoted. When the Congress opposed separate electorates in its 1909 Lahore session, for example, it referred to the distinction between Muslims and non-Muslims as "unjust, invidious, and humiliating".[55] Yet the rejection of communal politics by Nehru and Gandhi, and the Congress more generally, was not articulated alongside any positive theory. It was a rejection that emerged out of denial rather than engagement – a rejection that failed to confront the problem of representation with the seriousness that it demanded.[56] In this sense, the description of their views as universalistic may not be incorrect but it does not capture their stance.[57]

In the late 1920s and early 1930s, when Nehru began to comment on communal politics, he boldly declared that there was no place for a discussion of the Hindu-Muslim question.[58] Communalism was a "myth".[59] By denying the existence of any tension

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[55] Resolutions adopted by the Twenty-Fourth Session of the Indian National Congress, 27-29 December 1909, in *INC: The Glorious Tradition* (Volume 1) (A. M. Zaidi ed., New Delhi: Indian Institute of Applied Political Research, 1987) 295, p. 298.

[56] It is telling the even the Sapru Committee eventually linked communal tensions to economic realities. See *Constitutional Proposals of the Sapru Committee* (Bombay: Padma Publications, 1945), p. 184. At times, communal tensions taken to be merely a practical obstacle to get out of the way, so that focus could shift to the questions that really mattered. This is true even in the decades before Gandhi and Nehru acquired prominence. See, for example, Motilal Nehru, Views on the United Provinces Municipalities Bill of 1915, 19 July 1915, in *Selected Works of Motilal Nehru* (Volume 1) (Ravinder Kumar and Hari Dev Sharma eds., New Delhi: Vikas Publishing House, 1995) 303, p. 304.

[57] See Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Cambridge: Harvard University Press, 2013), pp. 208-215 (characterizing their views as universalistic). Jayal proceeds to also regard Hindu nationalism as a form of universalism. Here, as the ensuing discussion reveals, we agree.

[58] See Jawaharlal Nehru, "On Hindu-Muslim Unity", 9 June 1931, in *Selected Works of Jawaharlal Nehru* (Volume 5) (S Gopal ed., New Delhi: Orient Longman, 1973) 282, p. 282.

between Hindus and Muslims, Nehru was claiming its absence among India's masses.[60] Throughout the 1930s, Nehru drew a link between communal forces, on the one hand, and foreign rulers and upper classes, on the other. For him, neither group had any solution for India's economic problems, for any such solution would necessarily "upset the present social structure and devest the vested interests".[61] The communal mind was apathetic toward India's real difficulties – the alleviation of hunger, the improvement of agriculture, the development of industry, etc.[62]

In his 1936 autobiography, Nehru reiterated his belief that communalism was a colonial ploy "to preserve Indian vested interests against Indians themselves, against undiluted democracy, against an upsurge of the masses".[63] It had been *made* an issue during the Roundtable Conferences, a strategy to frustrate political negotiations.[64] In identifying the journey of Indian communalism, Nehru placed emphasis on Sir Syed Ahmad Khan's efforts to advance the Muslim community. Though Khan had rightly focused upon the education of Muslims and their economic progress, his narrow agenda

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[59] Jawaharlal Nehru, Presidential Address at the Punjab Provincial Conference, 11 April 1928, in *Selected Works of Jawaharlal Nehru* (Volume 3) (S. Gopal ed., New Delhi: Orient Longman, 1972) 219, p. 226.

[60] Jawaharlal Nehru, "On Minorities and Nationalism", 13 June 1931, in *Selected Works of Jawaharlal Nehru* (Volume 5) (S Gopal ed., New Delhi: Orient Longman, 1973) 283; Jawaharlal Nehru, "On Hindu-Muslim Unity", 9 June 1931, in *Selected Works of Jawaharlal Nehru* (Volume 5) (S Gopal ed., New Delhi: Orient Longman, 1973) 282.

[61] Jawaharlal Nehru, "Reality and Myth", 5 January 1934, in *Selected Works of Jawaharlal Nehru* (Volume 6) (S. Gopal ed., New Delhi: Orient Longman, 1974) 180, p. 182.

[62] See Jawaharlal Nehru, "Reality and Myth", 5 January 1934, in *Selected Works of Jawaharlal Nehru* (Volume 6) (S. Gopal ed., New Delhi: Orient Longman, 1974) 180, p. 184; Jawaharlal Nehru, "The Need for Pachayati Rule", 27 June 1936, in *Selected Works of Jawaharlal Nehru* (Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 292, p. 295.

[63] Jawaharlal Nehru, *An Autobiography* (New Delhi: Penguin Books, 2004 [1936]), p. 255.

[64] Nehru, *An Autobiography*, p. 307.

had "cramping effects" and paved the way for a division between Hindu and Muslim interests.[65] Muslim communalism was matched by Hindu counterparts, and the British had exploited both sides with equal prejudice. Communal demands, Nehru remarked, were ultimately economic and political demands that would only benefit a section of the upper middle class.[66] In 1936, Nehru also delivered the Presidential Address to the Lucknow Congress. Even though he gestured at the incompatibility between communalism and democracy and the former's capacity "to divide India into numerous separate compartments", his chief interest was in how communalism prevented economic transformation.[67] In 1938, he put the matter in the starkest possible terms, on two separate occasions:

> There is no religious or cultural problem in India. What is called the religious or communal problem is really a dispute among upper-class people for a division of the spoils of office or of representation in a legislature.[68]

> The so-called Hindu-Muslim problem is not a genuine problem concerning the masses, but it is the creation of self-seekers, job-hunters and timid people, who believe in British rule in India till eternity … Whether Hindus or Muslims, poverty, unemployment and other hardships affect them alike; and there it is nothing but playing a fraud with the country continuously to harp on the so-called Hindu-Muslim problem.[69]

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[65] Nehru, *An Autobiography*, p. 482.

[66] Nehru, *An Autobiography*, p. 146.

[67] Jawaharlal Nehru, Presidential Address to the Lucknow Congress, 12 April 1936 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 170, p. 189. See also Jawaharlal Nehru, "On the Indian Situation", 12 November 1935, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 35, p. 37.

[68] Jawaharlal Nehru, "The Unity of India", 16 *Foreign Affairs* 231 (1938), pp. 238-9.

[69] Jawaharlal Nehru, "The Worldwide Struggle Against Imperialism", 28 May 1936, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 7) (S. Gopal ed., New Delhi: Orient Longman, 1975) 265, p. 267.

Nehru characterized group-based thinking as "a medieval conception which has no place in the modern world".[70] The challenges that modernity posed were economic and political rather than religious, and the focus on religion was simply a distraction.[71] Jinnah's politics was characterized as the "politics of the Dark Ages".[72]

Nehru did recognize, on more than one occasion, the significance of the right to religious freedom.[73] He also made known that any future constitutional scheme would protect this right through judicially enforceable means.[74] But he did not explicate how modern citizenship could meet the problem of diversity, for he did not believe that there was any such problem that needed to be solved. If politics moved away from focusing on elites, if it spoke to the masses, we would notice the shared concerns that touched everyone equally. Every Hindu and Muslim farmer, for example, faced the same challenge of easing his debt.[75] The solution to the communal problem was, in other

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[70] Jawaharlal Nehru, Presidential Address to the All India Convention of Congress Legislators, 19 March 1937, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 8) (S. Gopal ed., New Delhi: Orient Longman, 1976) 60, p. 62. See also Jawaharlal Nehru, "The Parting of the Ways", 10 August 1940, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 11) (S. Gopal ed., New Delhi: Orient Longman, 1978) 101, pp. 112-113.

[71] Jawaharlal Nehru, "The Congress and the Muslims", 10 January 1937, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 8) (S. Gopal ed., New Delhi: Orient Longman, 1976) 119, p. 120.

[72] Jawaharlal Nehru, "The Communal Approach of Jinnah", 30 June 1937, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 8) (S. Gopal ed., New Delhi: Orient Longman, 1976) 136, p. 137.

[73] See Jawaharlal Nehru, "On Communalism", 11 August 1937, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 8) (S. Gopal ed., New Delhi: Orient Longman, 1976) 173, p. 174; Jawaharlal Nehru, "On the Rights of Minorities", 20 February 1938, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 8) (S. Gopal ed., New Delhi: Orient Longman, 1976) 765, p. 766.

[74] See Jawaharlal Nehru, "India's Demand and England's Answer", 6 January 1940 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 10) (S. Gopal ed., New Delhi: Orient Longman, 1977) 273, p. 280.

[75] Jawaharlal Nehru, "On the Rights of Minorities", 20 February 1938, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 8) (S. Gopal ed., New Delhi: Orient Longman, 1976) 765, p. 766.

words, to focus on other (real) problems.[76] For Nehru, Jinnah's reluctance to widen the franchise confirmed that communalism had no appeal for India's Muslim masses.[77] Both the Muslim League and the Hindu Mahasabha were two sides of the same coin. Both had "no social basis in the masses" and rested on "reactionary and semi-feudal supporters in the princes and landlords".[78] Their comparative advantage in politics was the support of such forces.

The stance that Nehru took entailed the distracting away of religious difference. As he put it, the "communal problem is not a religious problem".[79] In Bengal, the peasants were Muslims and the landlords were Hindus. On the face of it, a conflict between them might appear as a religious conflict whereas in fact it was a tenant-landlord conflict.[80] In the United Provinces, the situation was the opposite, with the Muslims as the landlords; and here too the problem would often be characterized as a religious one.[81] For Nehru, communal thinking had not only missed the point. More seriously, it was an active and invidious attempt "to take shelter behind the name of religion and prevent the people from joining the progressive forces, and consequently also to prevent the real problem – the economic problem – from being tackled".[82] In the epilogue to his

[76] Nehru, Presidential Address to the All India Convention of Congress Legislators, p. 62.

[77] Jawaharlal Nehru, Letter to Stafford Cripps, 17 January 1940, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 10) (S. Gopal ed., New Delhi: Orient Longman, 1977) 300, p. 301.

[78] Jawaharlal Nehru, "Rally Round the Congress", 28 April 1940 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 11) (S. Gopal ed., New Delhi: Orient Longman, 1978) 215, p. 215.

[79] Jawaharlal Nehru, "India and Britain", 6 July 1938 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 9) (S. Gopal ed., New Delhi: Orient Longman, 1976) 34, p. 49.

[80] Nehru, "India and Britain", p. 49.

[81] Nehru, "India and Britain", p. 49.

[82] Nehru, "India and Britain", p. 49.

autobiography, published five years later, Nehru described how communal demands had slowly grown more and more absurd. He now saw the battle against communalism as an additional battle to fight for the achievement of freedom, and framed it as a battle between those who sought independence and those who wanted to preserve the status quo.[83]

Nehru's thinking on this matter led him to treat Jinnah's call for a separate Muslim homeland with horror and shock. He lamented how the Muslim community had been defined as an ordinary minority in risk of oppression and how politics had turned away from the questions that mattered.[84] But even in such times he retained a belief in the economic origins of communal developments.[85] Rather than confront the problem of political representation head on, his attention drifted to the irrationality of the proposal in light of global trends:

> You are aware of the Muslim League Resolution on Pakistan, that India should be split up into Muslim India and Hindu India, for which a propaganda has been going on for the last one year and a half. Nobody thinks what is happening today in the world … No small country can exist in the present-day world. Hitler has destroyed all the small countries of Europe. The small countries of Asia are also gradually being swept out of existence. It means that if all these countries are to live in future they must live together.[86]

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[83] Jawaharlal Nehru, "Five Years Later", 17 October 1940 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 11) (S. Gopal ed., New Delhi: Orient Longman, 1978) 162, pp. 171-172. See also Jawaharlal Nehru, Letter to Syed Mahmud, 2 February 1942, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 12) (S. Gopal ed., New Delhi: Orient Longman, 1979) 511.

[84] Jawaharlal Nehru, Note on the Indian Background, 11 May 1942, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 12) (S. Gopal ed., New Delhi: Orient Longman, 1979) 301, p. 309.

[85] Jawaharlal Nehru, "Can Indians Get Together?", 19 July 1942, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 12) (S. Gopal ed., New Delhi: Orient Longman, 1979) 518, p. 521.

[86] Jawaharlal Nehru, "The War and the People", 31 January 1942, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 12) (S. Gopal ed., New Delhi: Orient Longman, 1979) 12, p. 16.

As the 1940s progressed, Nehru's engagement with the communal question showed some signs of change. In an interview in 1945, he suggested that India could either embrace modern democratic citizenship or adopt medieval forms of organization.[87] The fact that Nehru presented this as a genuine choice was itself a sign of the development of his thought, though the acknowledgment came alongside the assertion that communalism had no purchase among India's masses.[88] In an address titled *The Absurdity of Pakistan*, Nehru made several arguments against the division of India. The first was a reiteration of the unviability of small states. A partitioned nation would be akin to Iraq and Iran; that is to say, nations which were "not sovereign but just satellite powers, at the mercy of great nations".[89] Of Nehru's other arguments, a second deserves mention, namely his claim that Partition failed on its own terms. The divided territories would, after all, still contain minorities.[90] The solution that Nehru offered in this instance was federal: A united India with autonomous provinces that would secure minority freedom in cultural, linguistic, and religious matters.[91] These arguments were repeated in *The Discovery of India*, where Nehru saw the proposal for Partition as riddled with inconsistencies and as only

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[87] Jawaharlal Nehru, "A Clash of Outlooks", 14 July 1945 in *Selected Works of Jawaharlal Nehru* (First Series, Volume 14) (S. Gopal ed., New Delhi: Orient Longman, 1981) 40, p. 41.

[88] Nehru, "A Clash of Outlooks", p. 42.

[89] Jawaharlal Nehru, "The Absurdity of Partition", 17 July 1945, in *Selected Works of Jawaharlal Nehru* (First Series, Volume 14) (S. Gopal ed., New Delhi: Orient Longman, 1981) 49, p. 49.

[90] Nehru, "The Absurdity of Partition", pp. 49-50. For a similar view, see Rajendra Prasad, *India Divided* (New Delhi: Penguin, 2010 [1946]), pp. 19-20.

[91] Nehru, "The Absurdity of Partition", p. 51.

furthering the minority problem.[92] The proposal seemed senseless and Nehru struggled to understand its growing support. He was left acknowledging its emerging appeal in slow and partial terms, seeing it as a marker of the self-interest and prejudice that had consumed political life.

Mohandas Gandhi's response to religious difference seemed, at least on occasion, to take the same form as Nehru's, namely a dismissal of communal realities as being elite affairs. At a speech at Eton in 1931, Gandhi remarked that the "bugbear of communalism is confined largely to the cities which are not India".[93] The British had infected Indian society and "[t]he moment the alien wedge is removed the divided communities are bound to unite".[94] In subsequent years, he would often underplay Hindu-Muslim conflicts. In an interview to the *New York Times* in 1939, he acknowledged tensions between both communities but predicated that they would resolve themselves as both shared the same political and economic challenges.[95]

But Gandhi's answer to the Hindu-Muslim challenge was in fact rather different to Nehru's, and was altogether distinct. He sought a solution through non-institutional means, through political practice. It was the lived experience of toleration, of friendship

[92] Nehru, *The Discovery of India* (New Delhi, Penguin 2004 [1946]), pp. 588-590.

[93] Mohandas K. Gandhi, Speech at Gathering of Schoolboys, 23 October 1931, in *The Collected Works of Mahatma Gandhi* (Volume 48) (New Delhi: Government of India, 1971) 220, p. 221.

[94] Gandhi, Speech at Gathering of Schoolboys, p. 221.

[95] Mohandas K. Gandhi, Interview to the New York Times, 23 March 1939, in *The Collected Works of Mahatma Gandhi* (Volume 69) (New Delhi: Government of India, 1977) 76, p. 77.

and assistance, which could pacify communal tensions.[96] When communal tensions were rising in the early decades of the twentieth century, he asked Hindus and Muslims to "pray to *Khuda-Ishwar* in mosques and in temples to grant that there might be an end to the disputes that frequently arise between our two communities".[97] Hindus and Muslims did not need to hold one another's beliefs for mutual respect to occur. A serious attempt at toleration would have to proceed on the basis of trust; it could not adopt suspicion as its starting point.[98] Hindus and Muslims would have to practice unity, through acts of helping and aiding each other, for unity to be arrived at. This is why the *Khilafat* (Caliphate) movement, which sought to retain the sovereign religious power of the Turkish sultan, was such a fine opportunity to transcend differences.[99] Muslims had a genuine fear, founded or unfounded, of Hindu majoritarian rule. And, as a general matter, Hindus had the responsibility to protect Muslims.[100] The *Khilafat* movement was a way for Hindus to relate to a Muslim demand as a religious demand. Unity would not be forged out of institutional contracts and constitutional power-sharing mechanisms; it would emerge from instances of support and solidarity, and there was no better way to demonstrate for the majority community to show support and solidarity than by joining hands with the minority community in a cause that was special to them.

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[96] See Mohandas K. Gandhi, "Hindu-Mohammedan Unity", 25 February 1920, in *The Collected Works of Mahatma Gandhi* (Volume 69) (New Delhi: Government of India, 1968) 44.

[97] Mohandas K. Gandhi, "Hindu-Muslim Riots", 9 January 1909, in *The Collected Works of Mahatma Gandhi* (Volume 9) (New Delhi: Government of India, 1966) 134, p. 134.

[98] Mohandas K. Gandhi, "To Hindus", 29 August 1920, in *The Collected Works of Mahatma Gandhi* (Volume 18) (New Delhi: Government of India, 1965) 203.

[99] See Mohandas K. Gandhi, "Turkey", 7 September 1919, in *The Collected Works of Mahatma Gandhi* (Volume 16) (New Delhi: Government of India, 1965) 104, pp. 104-6.

[100] Mohandas K. Gandhi, Speech at Public Meeting, 7 April 1921, in *The Collected Works of Mahatma Gandhi* (Volume 19) (New Delhi: Government of India, 1966) 538.

Gandhi adopted a radical view of individual agency; for him, the practices he desired were always possible because individuals could always act in different ways, and could reimagine and reconstitute themselves. He did not reject this profoundly modern view of human nature; he simply denied institutional means to its realization. At a theological level, Hindu-Muslim unity was a genuine possibility because usual points of conflicts between both communities often involved non-essential aspects of their respective religious commitments.[101] When it came to such aspects, like Hindu objections to the disturbance caused by music playing at a mosque, one might feel annoyed but there was no challenge to one's theological beliefs. Indeed, he argued that Hinduism and Islam were versions of the same philosophy. A belief in particularities, fueled by foreign rulers and vested agendas, had obscured the shared faith that all religious captured. Gandhi made this point with great force in Chapter X of *Hind Swaraj*: "Is the God of the Mahomedan different from the God of the Hindu? Religions are different roads converging to the same point. What does it matter that we take different roads so long as we reach the same goal?"[102] All religions were roads to the same endpoint and it was a mistake to identify variances between them. The introduction of British rule – and, in particular, the advent of modernity – had created such differences. Acknowledging the commonality behind the veneer of difference would enable joint action. Hindus and Muslims, he contended, did not have to reject religion and attend to other matters for

[101] See Gandhi, Speech at Public Meeting.

[102] Mohandas K. Gandhi, *Hind Swaraj*, in *Hind Swaraj and Other Writings* (Anthony J. Parel, Cambridge: Cambridge University Press, 1997 [1909]), p. 53.

harmony to exist.[103] One could have firm religious beliefs but still undertake practices to forge unity with those whose beliefs were different. Gandhi did have a solution to the Hindu-Muslim problem but because it was a solution through non-institutional means, it did not involve any *theory* of representation.

There is no small irony in the fact that the one intellectual tradition that both acknowledged Hindu-Muslim difference and posited some version of universalism was Hindu nationalism. The twist was that this universalism was predicated on all Indians being Hindu. In the 1920s, an evolving concern for the preservation of Hinduism mutated into Hindu nationalism. Vinayak Damodar Savarkar was the man behind this "qualitative leap" in ideology.[104] In his 1923 text, *Hindutva: Who is a Hindu?*, Savarkar wove a thread of unity that tied Hindus together.[105] Hindutva, he claimed, was an all-encompassing idea, applicable to the entire Hindu race, and distinguishable from Hinduism, which was a narrower outlook that formed but one part of this grand vision. The origins of Hindutva were ancient and glorious, and Savarkar presented an evocative tale of Aryan settlement and expansion, consolidation and growth, and eventual nationhood. History was deployed to de-emphasize any differences among Hindus. "We,

[103] Gandhi's non-institutional orientation meant that he also did not call for a separation of religion from politics. See Mohandas K. Gandhi, *My Experiments with Truth* (Mahadev Desai trans., New Delhi: Penguin, 2012 [1940]), p. 435.

[104] Christophe Jaffrelot, *The Hindu Nationalist Movement in India* (New York: Columbia University Press, 1996), p. 25.

[105] V. D. Savarkar, *Hindutva: Who is a Hindu?* (Bombay: Veer Savarkar Prakashan, 5th edn., 1969). My reading of Savarkar's text is a familiar one, and I employ it to make the less familiar argument about the crisis of liberal representation. For a somewhat different, provocative reading of Savarkar's text that highlights its rhetorical moves and its emphasis on territoriality, see Janaki Bakhle, "Country First? Vinayak Damodar Savarkar (1883–1966) and the Writing of *Essentials of Hindutva*", 22 *Public Culture* (2010) 149.

Hindus", he boldly declared, "are all one and a nation, because chiefly of our common blood".[106] In challenging times, like invasions by foreigners, every kind of Hindu suffered and survived in the same way. As a term, "Hinduism" referred to "all the religious beliefs that the different communities of the Hindu people hold", and applied across the diverse practices and beliefs that Hindus held.[107] It was because Hindus shared not merely geography or association but "common blood" that they were a nation.[108] Savarkar proceeded to populate ways in which Hindus were participants in the same civilization, taking note of legal regulations, social customs, and so on.[109] By underlining such characteristics, those that did not share them were excluded. Muslims and Christians may share India's territory with Hindus. But even if they regarded it as their *Fatherland*, they did not view it as their *Holyland*.[110] Their loyalties were elsewhere, the elements that constituted their past were distinct, and their outlook toward India was one of a foreigner.

Savarkar's presidential addresses at the annual sessions of the Hindu Mahasabha affirmed many of these themes. A Hindu was defined as a person who took "this *Bharatbhoomi* from the Indus to the Seas as his Fatherland and Holyland".[111] Again, Muslims, Christians, etc., fell outside this category. Muslims had "[t]heir faces … ever turned towards Mecca and Medina" and were "often found to cherish an extra-territorial

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[106] Savarkar, *Hindutva*, p. 39.

[107] Savarkar, *Hindutva*, p. 105.

[108] Savarkar, *Hindutva*, p. 84.

[109] Savarkar, *Hindutva*, pp. 91-102.

[110] Savarkar, *Hindutva*, p. 113.

[111] V. D. Savarkar, Presidential Address, Akhil Bharatiya Hindu Manasabha, 1937, in *Hindu Rashtra Darshan* (2nd edn., Bombay: Veer Savarkar Prakashan, 1984) 5, p. 8.

allegiance".[112] The distinction between Hinduism and Hindutva was stressed, with Savarkar asserting that the Mahasabha was not simply a religious body that was interested in theological doctrine. Its ambitions were larger, namely the prosperity of a Hindu nation. In developing his ideology, Savarkar articulated a particular notion of freedom. In order for Hindus to be free, they could not merely acquire geographical control over the territory of British India. They would need to do more, and construct a state that could protect and nourish their particular identity. For Savarkar, Hindus and Muslims shared centuries of enmity, and their collective presence in British India marked the presence of two separate nations on one soil. The communal problem was a real problem, and the only solution to nationhood was homogeneity: "India must be a Hindu land, reserved for the Hindus".[113] Indeed, a fundamental error committed by the Congress had been to disregard the religious, racial, and cultural unity that was essential to the forming of a nation.[114]

Savarkar did not necessarily call for the exclusion of non-Hindus but he did call for their insubordination. Even if their territories were not given up, they were not to assert their rights as a minority. The animating theme in Savarkar's thought – namely, the stress on difference between Hindu and non-Hindus and the emphasis on similarity among Hindus – was furthered by a second prominent figure in Hindu nationalist thought, Madhav Sadashiv Golwalkar. A member of the Rashtriya Swayamsevak Sangh, Golwalkar interrogated the idea of nationhood in his 1939 work, *We or Our Nationhood*

[112] Savarkar, Presidential Address, p. 15.

[113] V. D. Savarkar, Presidential Address, Akhil Bharatiya Hindu Manasabha, 1938, in *Hindu Rashtra Darshan* (2nd edn., Bombay: Veer Savarkar Prakashan, 1984) 27, p. 57.

[114] Savarkar, Presidential Address, 1938, p. 45.

Defined.[115] The text depicted a magnificent ancient land of Hindus, stable and secure for thousands of years and surpassing all other civilizations in spiritual and intellectual progress. Eventually, however, it fell to foreign invaders, first to the Muslims and subsequently to the British. Nonetheless, the Hindu nation retained its underlying spirit, as evidenced by events like the 1857 revolt. According to Golwalkar, the Hindus were a nation because they shared the same territory, the same race, the same religion, the same spiritual and intellectual culture, and the same Sanskrit language. For Golwalkar, it naturally followed that those who resided in this territory without satisfying the additional abovementioned criteria could not be considered as part of the nation. It was only by embracing these criteria, by jettisoning their own distinctive features, that they could be included within the Hindu nation. Without that, they would exist as foreigners, lacking the rights and benefits of citizenship.

Elsewhere, Golwalkar argued that distinctions in matters like language, caste, and custom had been mistakenly used to deny a Hindu way of living. He regarded such distinctions are superficial, akin to the various parts of a tree. Beneath the apparent diversity was a form of unity that was natural. It was, for him, "ingrained in our blood from our very birth, because we are all born as Hindus".[116] Merely because Hindus had joined forces with Muslims or others against the British or merely because Muslims or others had resided in India, it did not follow that such groups could together form a nation. Such a theory of nationhood on the ground placed a mistaken emphasis on territoriality. It assumed that residence was sufficient to make the individual part of a

[115] M. S. Golwalkar, *We or Our Nationhood Defined* (Nagpur: Bharat Publications, 1939).

[116] M. S. Golwalkar, *Bunch of Thoughts* (Bangalore: Vikrama Prakashan, 1966), p. 118.

nation. For Golwalkar, a study of the past showed that "here was already a full-fledged ancient nation of the Hindus and the various communities which were living in the country were here either as guests, the Jews and Parsis, or as invaders, the Muslims and Christians".[117] His solution to the minority problem was the removal of the minority.

In contrast to these wide-ranging positions, the writings of two figures stand out. The first was Lala Lajpat Rai. An influential member of the Indian nationalist movement, Rai died in 1928 after being severely injured during protests against colonial political reform policies. Even though he never survived to encounter the intense unfolding of communal politics from the 1930s onward, Rai had already grasped the seriousness of the challenge at hand. His views are a reminder that the early Hindu Mahasabha, in which he played a prominent role, was not communal simply because it had religious commitments. Its politics was secular. In fact, interestingly enough, its commitment to Hinduism enabled it to take the question of religious diversity far more seriously than many others had managed. In the twentieth century's early years, Rai occupied the unique position of acknowledging Hindu-Muslim differences as well as rejecting communal mechanisms for their resolution. "Hindus", he remarked, "shall never cease to be Hindus and Mohammedans shall never cease to be Mohammedans".[118] But recognition of this reality did not preclude a shared political life. He found "no reason why [Hindus and Muslims] cannot make common cause in political work".[119] It would however be a mistake, indeed

[117] Golwalkar, *Bunch of Thoughts*, p. 142.

[118] Lala Lajpat Rai, "Need for Vigorous Political Activity in Punjab", 30 September 1906, in *The Collected Works of Lala Lajpat Rai* (Volume 2) (B. R. Nanda ed., New Delhi: Manohar, 2003) 49, p. 61.

[119] Rai, "Need for Vigorous Political Activity in Punjab", p. 61.

a denial of genuine difference, to attempt this endeavor within a communal framework: "Nothing could be more disastrous to the success of representative institutions, than their constitution on a denominational basis".[120]

In the aftermath of the non-cooperation movement of the early 1920s, Rai considered the demands of nationalist politics and the particular goal of Hindu-Muslim unity. He saw a joint enterprise between communities as "not the merger or the absorption of one into the other, but the integration of all into one whole, without in any way injuring or lessening each group individually".[121] A shared political project need not deny religious communities spaces of autonomy. What frustrated Rai was the superficial, indifferent treatment that the question of representation had invited. Indian nationalists, he alleged, "have shouted Hindu-Muslim unity from a thousand platforms and from house-tops, in and out of season, but we have devoted little thought as to the process or processes by which we propose to achieve it".[122] What had emerged as a result was a "laissez-faire" approach where different communities were engaged in competitive behavior to increase their power within the government rather than shared principles that could make government as a whole responsible.[123] Communal representation, he documented, had been extended from Muslims to other communities, from representation in legislative councils to local bodies, and from law-making bodies to public services and education. The trend was clear, and he viewed the mechanism as "a crude and clumsy

[120] Lala Lajpat Rai, "The Mahomedan Demand", 4 March 1909, in *The Collected Works of Lala Lajpat Rai* (Volume 3) (B. R. Nanda ed., New Delhi: Manohar, 2004) 198, p. 199.

[121] Lala Lajpat Rai, "The Program of Non-cooperation", 1924, in *The Collected Works of Lala Lajpat Rai* (Volume 10) (B. R. Nanda ed., New Delhi: Manohar, 2008) 206, p. 207.

[122] Rai, "The Program of Non-cooperation", p. 208.

[123] Rai, "The Program of Non-cooperation", p. 208.

device … likely to land us in difficulties which no one is thinking of at present".[124] The British had "created, fostered and nourished" this way of thinking and Indians had done little to imagine otherwise.[125] For Rai, the fundamental intellectual error of his generation had been to either embrace a "collection of mutually warring, struggling, competing religious communities with chances of victory or domination for whatsoever turns out to the strongest, the most efficient, and the most powerful" or to argue for "a complete obliteration of all religious differences".[126]

Rai did not advance a full-fledged theory of non-communal representation but he did recognize that a secular political community could not take a sacrosanct orientation towards every religious practice. Although religious belief may be beyond question, modern citizenship required the sacrificing of some portion of freedom.[127] For Rai, there was "no such thing as an absolute right vested in any individual or in any community forming part of a nation".[128] As the use of one's rights would inevitably clash with another's, it was essential for rights to be "adjusted and correlated that they might be exercised without doing injury to each other".[129] The regulation of rights would depend on many factors, of course, but it would in part rest on a distinction between religious

[124] Rai, "The Program of Non-cooperation", p. 209.

[125] Lala Lajpat Rai, "The Indian Problem: A Few Stray Thoughts", 1924, in in *The Collected Works of Lala Lajpat Rai* (Volume 10) (B. R. Nanda ed., New Delhi: Manohar, 2008) 345, pp. 346-7.

[126] Rai, "The Indian Problem: A Few Stray Thoughts", p. 348.

[127] Lala Lajpat Rai, *Hindu-Muslim Unity: The Problem and its Solution*, 1925, in *The Collected Works of Lala Lajpat Rai* (Volume 11) (B. R. Nanda ed., New Delhi: Manohar 2008) 135, p. 145.

[128] Rai, *Hindu-Muslim Unity*, p. 140.

[129] Rai, *Hindu-Muslim Unity*, p. 142.

practices that were essential and those that were non-essential.[130] He regretted how several religious reform movements had only perpetuated the idea of religious rights being absolute. The movements among Sikhs and Muslims, the Arya Samaj, and so on, had all emphasized religious practices. Even Gandhi's approach to the *Khilafat* movement had betrayed this sensibility, for he had chosen to give it a religious rather than political fabric.[131]

In charting out a history of communal relations, Rai, as others had done, placed emphasis on the contribution of Syed Ahmed Khan. The fears that Khan had were not without foundation, but posing the matter as he did had major implications for the political arrangements that emerged.[132] In December 1925, Rai delivered the presidential address to the Bombay Hindu Mahasabha Conference. He used the opportunity to describe how the communal representation was self-perpetuating. A concession towards one community would inevitably result in the concession towards others, political mobilization on community lines would only increase, and community-based polarization was internal to the logic of the arrangement.[133] He was apprehensive of the direction that Indian politics was taking, and, more than two decades before Partition, predicted that "[o]nce you accept communal representation with separate electorates, there is no chance of its being abolished without a civil war".[134]

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[130] Rai, *Hindu-Muslim Unity*, p. 144.

[131] Rai, *Hindu-Muslim Unity*, pp. 143-6.

[132] Rai, *Hindu-Muslim Unity*, pp. 166-167.

[133] Lala Lajpat Rai, "Presidential Address to the Bombay Hindu Mahasabha Conference", 5 December 1925, in *The Collected Works of Lala Lajpat Rai* (Volume 11) (B. R. Nanda ed., New Delhi: Manohar 2008) 269, pp. 271-273.

[134] Rai, *Hindu-Muslim Unity*, p. 172.

A second unusual intervention in the debate on representation was made by B. R. Ambedkar. His tract *Pakistan or the Partition of India* stands out for its unrelenting questioning of communal politics.[135] Initially published as *Thoughts on Pakistan* only months after the 1940 Lahore Resolution, Ambedkar saw the problem of Pakistan to be a real one. He rejected the idea that "the demand for Pakistan is the result of mere political distemper, which will pass away with the efflux of time".[136] The text was in no way a defense of the Muslim League's call for Pakistan, but it did show that the call could not be reduced to prejudice or political strategy. It rested on a number of important arguments that could not be summarily dismissed.

Ambedkar challenged the impression that Hindus and Muslims formed one nation. They may share experiences, speak the same language, enjoy relatable customs, and so forth, but none of this meant that they both constituted one nation. The similarities that existed were, for Ambedkar, "the result of certain purely mechanical causes".[137] This was partly because though several Muslims had converted from Hinduism, many such conversions remained incomplete, thereby revealing shared social norms with Hindus. And part of the explanation was "the effect of [a] common environment" to which both Hindus and Muslims had been exposed.[138] A further cause was "remnants of a period of

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[135] B. R. Ambedkar, *Pakistan or the Partition of India*, 1946, in *D. R. Babasaheb Ambedkar Writings and Speeches* (Volume 8) (Vasant Moon ed., New Delhi: Government of India, 2014) 1. For responses to this text, see Dhulipala, *Creating a New Medina*, pp. 150-170.

[136] Ambedkar, *Pakistan or the Partition of India*, p. 7.

[137] Ambedkar, *Pakistan or the Partition of India*, p. 33.

[138] Ambedkar, *Pakistan or the Partition of India*, p. 33.

religious amalgamation between the Hindus and the Muslims" under Akbar, what Ambedkar referred to as "the result of a dead past which has no present and no future".[139] These sociological factors had been mistakenly understood to propose a theory of unity. But Ambedkar saw the past as offering no relief for supporters of an undivided India. Hindus and Muslims, he remarked, "have been just two armed battalions warring against each other".[140] There "was no cycle of participation for a common achievement"; what existed was "a past of mutual destruction, a past of mutual animosities, both in political as well as in the religious fields".[141] The unity was neither geographical (for this was the result of "nature") nor to do with ways to life (as this arose from an "exposure to a common environment") nor administrative (as was revealed by the easy partition of Burma in 1937 after over a century of being tied to India).[142] For a union to exist, "it must be founded on a sense of kinship, in the feeling of being kindred".[143] It was this fundamental sense of spirit that Ambedkar found missing.

The question was not only one of historical accuracy or consistency. These were, to be sure, important features of the argument and needed addressing. As a matter of principle, for instance, Ambedkar pointed out that "if the Hindus did not object to the severance of Burma from India, it is difficult to understand how the Hindus can object to the severance of an area like Pakistan, which … is politically detachable from, socially

[139] Ambedkar, *Pakistan or the Partition of India*, pp. 33-34.

[140] Ambedkar, *Pakistan or the Partition of India*, p. 35.

[141] Ambedkar, *Pakistan or the Partition of India*, p. 35.

[142] Ambedkar, *Pakistan or the Partition of India*, pp. 65-66.

[143] Ambedkar, *Pakistan or the Partition of India*, pp. 65-66.

hostile and spiritually alien to, the rest of India".[144] He also noted that the Congress accepted territorial divisions on linguistic lines and it was "no use saying that the separation of Karnatak and Andhra is based on a linguistic difference and that the claim to separation of Pakistan is based on a cultural difference".[145] Difference rooted in language was "simply another name for cultural difference".[146] However, the principal reason why the call for Pakistan had a basis was neither the validity of Muslim allegations for unfair treatment nor the reasonableness of their fears of Hindu tyranny. It was instead the same reason that Indian nationalists offered against the British for self-government – popular sovereignty.[147] Ambedkar pointed out that "the demand by a nationality for a national state does not require to be supported by any list of grievances".[148] For it to be justifiable, all it needed was the "will of the people".[149]

It is to Ambedkar's credit that he drew attention to the gravity of the communal problem. He attacked the Communal Award of 1932, which granted separate electorates in provincial and state legislatures and guaranteed weightage for Muslims in Hindu majority provinces. He regarded it as "iniquitous inasmuch as it accords unequal treatment to the Hindu and Muslim minorities".[150] While in the Hindu Provinces, the Muslim minority had the exclusive authority to "choose the kind of electorates it wants

[144] Ambedkar, *Pakistan or the Partition of India*, pp. 65-66.

[145] Ambedkar, *Pakistan or the Partition of India*, p. 28.

[146] Ambedkar, *Pakistan or the Partition of India*, p. 28.

[147] Ambedkar, *Pakistan or the Partition of India*, p. 42.

[148] Ambedkar, *Pakistan or the Partition of India*, p. 35.

[149] Ambedkar, *Pakistan or the Partition of India*, p. 35.

[150] Ambedkar, *Pakistan or the Partition of India*, pp. 107-108.

… in the Muslim provinces, it is the Muslim majority which is allowed to choose the kind of electorates it prefers and the Hindu minority is not permitted to have any say in the matter".[151] The attempt to carve out communal provinces was a similarly fraught endeavor, leaving as it did each majority province with major minority populations. This scheme was sometimes defended as promoting harmony by offering each community a chance to mistreat minorities, in case minorities were mistreated by the other community. But this was a depraved argument; it put in place a "system of protection, in which blast was to be met by counter-blast, terror by terror, and tyranny by tyranny".[152] The logic offered no hope to an enduring communal peace was and was instead "a system of communal hostages".[153]

The problem of Hindus and Muslims did not turn on their individual vices. It is true that Ambedkar rejected several Hindu arguments that denied the individuality of Muslim identity. He also lamented the attitude of Muslim political leaders, who were resistant to "recognize secular categories of life as the basis of their politics because to them it means the weakening of the community in its fight against the Hindus".[154] But the real problem here was structural. It was "inherent in a situation where a minority is pitted against a majority"[155] and "sure to last as long as the Hindus and Muslims are required to live as members of one country under the mantle of a single constitution".[156] It was hard

[151] Ambedkar, *Pakistan or the Partition of India*, pp. 107-108.

[152] Ambedkar, *Pakistan or the Partition of India*, p. 110.

[153] Ambedkar, *Pakistan or the Partition of India*, p. 110.

[154] Ambedkar, *Pakistan or the Partition of India*, p. 236.

[155] Ambedkar, *Pakistan or the Partition of India*, p. 111.

[156] Ambedkar, *Pakistan or the Partition of India*, pp. 247-248.

to avoid such a problem with "two communities facing each other, one a majority and the other a minority, welded in the steel-frame of a single government".[157] Pakistan held the promise of solving the communal problem, though this would turn on how the boundaries were drawn. A Pakistan whose boundaries tracked the North-West Provinces and Bengal would only exasperate tensions: "The rule of the Hindu minorities by the Muslim majorities and the rule of the Muslim minorities by the Hindu majorities were the crying evils" of the proposed division.[158] It was only by exiting the model of mixed states that communal peace could be found. To achieve this, Ambedkar proposed the transfer of minorities.[159]

Throughout *Pakistan or the Partition of India*, we notice Ambedkar's interest in the widespread failure to address Hindu-Muslim relations. Efforts at harmony had been futile because the reality of difference had been ignored. This difference was not a function of material reasons. Rather, it was "formed by causes which take their origin in historical, religious, cultural and social antipathy, of which political antipathy is only a reflection".[160] Both the Hindu nationalists and the Congress had failed to address the Muslim question effectively. The former simply sought to eradicate Muslims – their philosophy was "not merely arrogant but … arrant nonsense".[161] The latter mistakenly

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[157] Ambedkar, *Pakistan or the Partition of India*, p. 11.

[158] Ambedkar, *Pakistan or the Partition of India*, p. 112.

[159] Ambedkar, *Pakistan or the Partition of India*, p. 116.

[160] Ambedkar, *Pakistan or the Partition of India*, p. 329.

[161] Ambedkar, *Pakistan or the Partition of India*, pp. 269-270.

appeased the Muslims community, and the appeasement of demands and "policy of concession" had only increased Muslim aggression.[162]

On revision, the chapter that Ambedkar added to the text confirms that the work should not be seen as a text in favor of the territorial division of British India. Here, he went so far as to gesture at possible forms of a common political life, organized around shared social and economic concerns. Rather than accept or reject the call for Partition, Ambedkar's aim was to show that the call was a serious one, and acknowledging its seriousness meant recognizing the inevitable tension that would persist in a united India. He was unclear on how precisely the division of territory would solve tensions in the India that remained. Hindustan, he noted, was likely to remain a state with Hindus and Muslims, unlike Pakistan which could be imagined as a homogenous entity. The spread of the Muslim population across India made it impossible to homogenize the population through the drawing of boundaries. At one place in the tract, Ambedkar appears to suggest that Hindustan would still suffer from "disharmony" as a consequence of being "a composite state".[163] But later he seems more optimistic, predicting that each new territory that would be born could "become a strong and well-knit state".[164] A division would be better than "trading in safeguards which have proved so unsafe".[165] Pakistan may have "the demerit of cutting away parts of India", but it also had "the merit of introducing harmony in place of conflict."[166] Moving beyond the current communal

[162] Ambedkar, *Pakistan or the Partition of India*, pp. 269-270.

[163] Ambedkar, *Pakistan or the Partition of India*, p. 117.

[164] Ambedkar, *Pakistan or the Partition of India*, p. 220.

[165] Ambedkar, *Pakistan or the Partition of India*, p. 116.

[166] Ambedkar, *Pakistan or the Partition of India*, p. 220.

scheme would liberate both Hindus and Muslims and take away their fears of tyranny and intrusion.[167] The partitioning of British India would result in two territories with greater internal homogeneity, and the event, Ambedkar contended, might thereby benefit both nations.[168]

III

When we see the remarkable hold that communal representation had on India's political imagination, the Constituent Assembly's turn away from such a conception is noteworthy. The Assembly rejected separate electorates, weighted representation, and reservations on the basis of religion. Only days before Independence and Partition, Sardar Patel wrote in his capacity as Chairman of the Advisory Committee on Minorities, Fundamental Rights, etc., to the President of the Assembly to explain why separate electorates had been rejected. The electoral scheme, he stated, "has, in the past, sharpened communal differences to a dangerous extent and has proved one of the main stumbling blocks to the development of a healthy national life".[169] He registered the Committee's view that it was "specially necessary to avoid these dangers in the new political conditions that have developed in the country…".[170] In prior months, Indian leaders including Patel had openly declared that communal electorates were bound to encourage

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[167] Ambedkar, *Pakistan or the Partition of India*, pp. 247-248.

[168] Ambedkar, *Pakistan or the Partition of India*, p. 220.

[169] Letter from Vallabhbhai Patel to the President, Constituent Assembly of India, 8 August 1947, available in *Constituent Assembly Debates* (Volume 5) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 243.

[170] Letter from Vallabhbhai Patel to the President, Constituent Assembly of India, p. 243.

communal sentiments.[171] Gandhi went so far as to remark that one "cannot have a healthy political life in any country where the electorates which should exercise the sovereign controlling power are based upon religion, race, creed or caste".[172] Now, with the birth of two separate nations, their fears had been realized.

In the Assembly, Patel turned to the further decision to drop reservations based on religion. Previously, such reservations had been permitted because "conditions were different and even the effect of Partition was not fully comprehended or appreciated".[173] The *new conditions* – namely the territorial division of British India – had changed matters; they had demonstrated how communal representation had failed on its own terms. A great deal turns on how we read the years preceding the end of colonial rule. For some participants in the Assembly, the lesson of Partition was not "abolishing even the niggardly safeguards that were given to the Muslims and other minorities … [but] giving them better and real safeguards".[174] But for the vast majority of members, Partition exposed the inability of communal representation to provide for a sustainable political environment. Indeed, Patel's response to the call by Muslim League members for differentiated citizenship was quite simply that such a scheme had already been tried and

[171] Letter from Vallabhbhai Patel to Amrit Lal Malhotra, 30 January 1946, in *Sardar Patel's Correspondence 1945-50* (Volume 2) (Durga Das ed., Ahmedabad: Navajivan Publishing House, 1973) 301.

[172] Mohandas K. Gandhi, Talk with Sir Stafford Cripps, 10 April 1946, in *The Collected Works of Mahatma Gandhi* (Volume 94) (Government of India: Publications Division, 1994) 255, p. 262.

[173] Speech by Vallabhbhai Patel, Constituent Assembly of India, 25 May 1949, in *Constituent Assembly Debates* (Volume 8) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 269.

[174] Speech by Mohamed Ismail Sahib, Constituent Assembly of India, 25 May 1949, in *Constituent Assembly Debates* (Volume 8), p. 277.

had led to the division of territory.[175] Muslims had been granted separate electorates by the Morley-Minto reforms of 1909.[176] Notes and memoranda by members of the Assembly expressed the same sentiment. K. T. Shah, for example, lamented that "every attempt [to solve the problem of representation] has so far ended in failure, making the tension and virulence worse than ever before".[177]

The four decades following the 1909 arrangement were spent trapped in power-sharing schemes of Byzantine complexity, ranging from territorial autonomy to separate electorates to weightage to reserved quotas. The failure of the Cabinet Mission plan of 1946 – which proposed a federation with strong provinces divided according to their religious composition and a single center with limited powers – was the last stage in these game-theoretic proposals. It was from the ruins of these proposals that representation centered on individual agency emerged. That is to say, it arose out of an internal critique of communal representation. The workings of communal representation had given rise to a form of politics where representatives were fated to speak with sole reference to their community. It installed a form of representation that became condemned to endless negotiations over the appropriate balance of one community with regard to another, until its logic left no further option available other than the breakdown of a single political community.

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[175] Speech by Vallabhbhai Patel, Constituent Assembly of India, 28 August 1947, in *Constituent Assembly Debates* (Volume 5), pp. 270-272.

[176] Through this measure, Minto took the "the principle of counterpoise", which had been used for the representation of classes in measures such as the Councils Act of 1892, and applied it to communities. See K. B. Krishna, *The Problem of Minorities or Communal Representation in India* (London: George Allen and Unwin, 1939), pp. 74-91.

[177] K. T. Shah, Memorandum on minorities, March/April 1947, in *The Framing of India's Constitution: Select Documents* (Volume 2) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 377, p. 378.

Partition decapitated the Indian imagination. There was the element of real tragedy, the loss of life and livelihood, and there was the defacing of an idea. The civilizational unity that Gandhi and Nehru took to be India's destiny suddenly felt romantic and naïve. The unforgiving empire of politics seemed condemned to a rationality of its own. What appeared to be artificial differences, gasps of momentary fear and insecurity, plaints that defied common sense, had torn through the South Asian subcontinent. Just as one could not escape the reality of Partition, one could not avoid its philosophical implications. It exposed the insistence and the shortcomings of a politics performed through communal eyes. And it showed the power of such politics – where it could lead and how much it could transform. Partition's revealing of the plasticity of human passions opened the door to a second, more normatively grounded, rationale for non-communal representation: the relationship between such representation and democratic life.

Previously, communal schemes like separate electorates and weighted representation had been seen as anti-democratic in the elementary sense that they did not neatly respect the preference of the majority.[178] Partition encouraged deeper engagement with the demands of political participation in a society that would be free. A self-governing polity, the Framers contended, called for a different conception of representation than one suitable to an autocratic state. The Congress leader Govind Ballabh Pant underlined this difference in a speech on separate electorates:

[178] See Vallabhbhai Patel, Letter to Nihchaldas C. Vazirani, 2 June 1946, in *Sardar Patel's Correspondence 1945-50* (Volume 3) (Durga Das ed., Ahmedabad: Navajivan Publishing House, 1973) 105.

> In the olden days, whatever be the name under which our Legislatures functioned, in reality they were no more than advisory bodies. The ultimate power was vested in the British and the British Parliament was the ultimate arbiter of our destiny. So long as the power was vested in the foreigners, I could understand the utility of separate electorates. Then perhaps the representatives of different communities could pose as the full-fledged advocates of their respective communities and as the decision did not rest with the people of the country they could satisfy themselves with that position. But it is not merely a question of advocacy now. It is a question of having an effective decisive voice in the affairs and in the deliberations of the Legislatures and the Parliament of this free country. Even if in an advisory capacity one were a very good advocate, he cannot be absolutely of any use whether to his clients or to himself if the Judge whom he has to address does not appreciate his arguments, sentiments or feelings, and there is no possibility of the Advocate ever becoming, a Judge. I want the Advocate to have also before him the prospect of becoming a Judge. In the new status that we have now secured, every citizen in this country should in my opinion be able to rise to the fullest stature and always have the opportunity of influencing the decisions effectively; so I believe separate electorates will be suicidal to the minorities and will do them tremendous harm.[179]

This intervention was of some importance. On Pant's account, the question was whether citizens were to be seen as beneficiaries or participants. The state in a democracy was not a paternal entity but instead a collaborative project. Communal representation did not involve such collaboration. It created "rival loyalties" rather than one "centered round the state".[180] But to be a democratic citizen meant to participate in a joint venture; it meant to exercise agency in determining the outcomes that the enterprise produced. This

[179] See Speech by Govind Ballabh Pant, 27 August 1947, in *Constituent Assembly Debates* (Volume 5), pp. 222-223. Bajpai has rightly underlined the importance of this speech but offers a very different overall account for the retrenchment of communal measures. See Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (New Delhi: Oxford University Press 2011).

[180] Speech by Govind Ballabh Pant, 27 August 1947, in *Constituent Assembly Debates* (Volume 5), p. 224.

conception, as is evident, was linked in significant ways to the idea of equality: people were equal because they were equal partners in the project.[181]

The anthropology behind such reasoning is worth unpacking. One's preconceived identity mattered even if one could vote independently: when people conceive of someone in a particular way, the person has to respond to that conception, and this very fact means that their identity is being re-ordered. One could not be a political agent, the founders argued, unless one's political identity was self-created. Without such power, there was little sense in which my actions could be counted as mine. In the colonial era, much contestation ensued over the accuracy of ongoing representative claims. The Congress and the Muslim League, for example, often challenged one another over which of the two spoke for India's Muslims. Such contests over the accuracy of representation had some rationale in situations where there was no voting. One had to determine the real representative of a certain section of the population – and communal representation was seen as a way to accurately reflect the interests of different communities. But such reasoning was unsuitable in democratic conditions because people could now choose their representatives for themselves. Their views did not need divining.

Both communal representation under colonialism and non-communal representation under democracy were, to be sure, forms of *representation*. But the former was a representation of one's predetermined identity; the latter was a representation of one's vote. By boxing a democratic people into communal categories one could not

[181] See T. M. Scanlon, *The Diversity of Objections to Inequality* (Kanas: University of Kansas, 1996), pp. 5-9.

enable this latter form of representation.[182] A model of communal representation was one centered on reflecting the composition of society. In such a framework, being a representative was not about being granted authority and being held accountable for the exercise of that authority. It was a means of offering information rather than acting; it is about standing in for another.[183] It was about what type of person one was, and not about what one did. Here, as is rightly observed, "[i]n political terms, what seems important is less what the legislature does than how it is composed".[184] One problem with this, as many Indians saw, was that the recognition of communal distinctions would mean the disavowal of many other distinctions.[185]

But the more serious problem, as Indians later came to understand, was the denial of agency. The communal schema predetermined the attributes that were salient for politics. When the Indian Franchise Committee rejected adult suffrage in 1932, its alternative proposal was to "give reasonable representation to the main categories of the population".[186] It this way it condemned voters to those categories, and did not allow for them to be constructed by politics. One can see why this schema would trouble the democratic mind. A core justification for voting, after all, is that even if mechanisms like a lottery might respect equality, voting treats individuals as agents. Their individual

[182] For a study of descriptive representation and its limitations, see Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), pp. 60-91.

[183] Pitkin, *The Concept of Representation*, pp. 61, 80-81.

[184] Pitkin, *The Concept of Representation*, pp. 61.

[185] See K. T. Shah, *Provincial Autonomy* (Bombay: Vora & Co., 1937), p. 33.

[186] Indian Franchise Committee, *Report of the Indian Franchise Committee* (Volume 1) (Calcutta: Government of India Central Publication Branch, 1932), p. 20.

preferences contribute to the common life that is created.[187] India's founders would now and again describe communal arrangements in much the same way as they described the princely kingdoms: both were seen as relics from an age long past. Setting aside the rhetorical apparatus at work here, there is an important sense in which communal arrangements were pre-modern. A hallmark of modernity was taken be to the idea that one's political universe could be the consequence of construction; it was not inherited or natural but created. And to be a citizen in the modern world was to be a participant in that act of creation.

The belief that the British had engineered Hindu-Muslim conflict had animated Indian political thought for decades. Now, with the onset of Partition and the advent of democracy, this idea acquired a very particular orientation. Previously, the British role in communal politics had been emphasized to deny the reality of such politics. But the trajectory of communal politics had made such denial impossible; it had become clear that such politics had acquired a life of its own. The British role was now highlighted to show how identities and the role that they played could change. To put the point simply, the colonial vision of representation had shown that representation could create its own reality.[188] It showed that Hindu-Muslim conflict *could* be engineered. This was a hard lesson at the time but the insight did enable a radical, and in some ways gratifying, take on democracy. The classification and enumeration performed by the colonial state had accorded permanence and tangibility to the social world. But the imagery sketched by

[187] See Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (New York: Cambridge University Press, 2016), pp. 260-262.

[188] See Speech by Begum Aziz Rasul, Constituent Assembly of India, 22 November 1949, in *Constituent Assembly Debates* (Volume 11) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 775; Speech by Alladi Krishnaswami Ayyar, Constituent Assembly of India, 23 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 835.

democratic life, with its shifting conceptions of majorities and minorities, was radically distinct and rested on the fluidity of political identities. The world prior to colonial citizenship has rightly been described as "a world of minorities, because this world was not governed by a form of politics which would make a statistical majority a vital principle of advantage".[189] It has, for this reason, been correctly stated that it is "deeply misleading … to suggest, even absent-mindedly, that there were majorities and minorities before the colonial enumeration process".[190]

Politics under democratic conditions was seen as something other than the effective advocacy of preset interests. It was understood as having agency in determining what those interests were. The adoption of communal categories in a democracy would only, Nehru contended, isolate pre-defined minorities.[191] The logic for such categories under autocratic rule had vanished where popular authorization arose. To have preset interests was to be anti-political, for it was to presume that certain interests were fixed and outside the realm of politics. It was in this fundamental way that the communal representation was viewed as incompatible with the idea of modern democratic citizenship. To hold that the presence of varying religious commitments in a single society would necessarily result in a certain kind of behavior – and it thereby called for a political regime to tackle that behavior – took away the voluntary power of Indians to act as they wished. In assuming a fixed correspondence between social composition and

[189] Sudipta Kaviraj, *The Enchantment of Democracy and India* (Ranikhet: Permanent Black, 2011), pp. 170-171.

[190] Kaviraj, *The Enchantment of Democracy and India*, p. 171.

[191] Speech by Jawaharlal Nehru, Constituent Assembly of India, 26 May 1949, in *Constituent Assembly Debates* (Volume 8), p. 330.

political action, both the colonial state and figures like Jinnah were guilty of the same kind of essentialism.

As should be evident, the rejection of communal representation was an act of some political imagination. The Founders envisaged a form of political contestation which would not merely reflect social life but transform it.[192] To commit to self-government was to believe in that capacity for self-transformation. To give Indians the right to vote without giving them the right to determine their interests would be to imagine that Indians were only capable of associating on communal terms; it would be to hold that they lacked the potential to form other kinds of arrangements and act on other considerations.[193] This was, of course, how imperial ideology had conceived of Indians.

This vision was made possible by the recognition that any kind of political identity would – as colonial citizenship had so powerfully shown – not only be a form of recognition but also be an act of constitution. It would create and cement identities in the

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[192] One alterative put forth was proportional representation. Distinct from separate electorates and reservations, it was seen as an inclusive measure that offered a genuine alternative. See Speech by Somnath Lahiri, Constituent Assembly of India, 19 December 1946, in *Constituent Assembly Debates* (Volume 1) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 137; Speech by Hussain Imam, Constituent Assembly of India, 8 November 1948, in *Constituent Assembly Debates* (Volume 7) (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 303; Speech by Kazi Syed Karimuddin, Constituent Assembly of India, 4 January 1949, in *Constituent Assembly Debates* (Volume 7), pp. 1233-1255; Speech by Z. H. Lari, 25 May 1949, in *Constituent Assembly Debates* (Volume 8), pp. 283-285, 285-287. But proportional representation invited harsh criticism. In addition to the same limitations it placed on political life as communal representation, it was viewed as a recipe for fragmented government and political instability. See Speech by K. M. Munshi, Constituent Assembly of India, 17 July 1947, in *Constituent Assembly Debates* (Volume 4), (New Delhi: Lok Sabha Secretariat, 2009 [1950]), pp. 643-644; Speech by B. R. Ambedkar, Constituent Assembly of India, 4 January 1949, in *Constituent Assembly Debates* (Volume 7), pp. 1261-1263. It was also viewed as requiring a high level of literacy and was therefore taken to be inapplicable to India. See Speech by B. R. Ambedkar, Constituent Assembly of India, 4 January 1949, in *Constituent Assembly Debates* (Volume 7), pp. 1261-1263. See also Speech by Begum Aizaz Rasul, Constituent Assembly of India, 25 May 1949, in *Constituent Assembly Debates* (Volume 8), p. 303; Speech by R. K. Sidhva, Constituent Assembly of India, 26 May 1949, in *Constituent Assembly Debates* (Volume 8), p. 318; Speech by Shibban Lal Saksena, Constituent Assembly of India, 26 May 1949, in *Constituent Assembly Debates* (Volume 8), pp. 319-320; Speech by Vallabhbhai Patel, 26 May 1949, in *Constituent Assembly Debates* (Volume 8), pp. 352-353.

[193] See Sudipta Kaviraj, "The Curious Persistence of Colonial Ideology", 21 *Constellations* 186 (2014).

process of acknowledging them. Jinnah's achievement lay in taking representation seriously at a time when few others were similarly willing. His failure lay in an intransigent commitment to an earlier form of politics. It was impossible for him to conceive of a political life that might be performed on different terms. Indeed, the limits of his imagination are best captured by his demand for a separate state, for the underlying premise of such a demand was that minorities could only secure themselves by a way of an arrangement that converted them into a majority.[194] For India's founders, the practical failure of communal arrangements and the constitutive promise of democracy suggested a different hypothesis, namely that minorities could be best secured in an environment where the question of who constituted a majority and a minority was always subject to political contestation.

IV

Thus far we have considered why non-communal representation was seen as appropriate for a democratic citizenry, with communal representation offering an unviable alternative. Our attention has been focused, in particular, on the relationship between political representation and religious diversity. But this was not the only relationship that posed a challenge for the meaning of citizenship. The institution of caste and the condition of lower caste groups was an additional matter of concern. At the Founding, the Constitution permitted reserved quotas for lower caste groups, a fact that may seem at odds with the turn away from communal representation. Some scholars have viewed the

[194] Kaviraj, *The Enchantment of Democracy and India*, p. 172.

stance toward lower caste groups as indicative of the Constitution's ambivalence and paradoxical orientation.[195] Others have regarded it as an acknowledgment of the limitations of formal equality and the exceptional status of lower caste groups.[196] More recently, it has encouraged the telling of the story of Indian citizenship through a less conceptually unifying narrative. The effort has been to study each case by itself, distinguishing between the Muslim and lower caste dilemma and seeing each as shaped by the separate concerns of majoritarian rule and discrimination respectively.[197]

Each of these approaches has some virtues but there is another way to understand the treatment of caste. In this part, I shall show that reserved quotas for lower castes were determined by concerns pertaining to democracy, and should be understood as falling under the same normative umbrella as the rejection of communal representation. This rejection, as we have seen, was driven by a distinct conception of citizenship. To be a member of a democratic society was understood as being a political participant; communal representation was viewed as suitable for societies where one was a subject rather than an agent. The conceptual unity that I hope to capture is partly achieved by a better understanding of the precise commitment toward lower caste groups, a matter that has received surprisingly little scrutiny. Although it may appear ex facie that the preferential treatment toward the lower castes was a way to recognize a group identity, the approach with regard to caste was, as in the case of religion, driven by a desire to unchain imposed group identities and to liberate the individual. A study of the special

[195] See Susan Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (New York: Cambridge University Press, 1999), pp. 268-278.

[196] See Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (Berkeley: University of California Press, 2009), p. 23.

[197] See Jayal, *Citizenship and Its Discontents*, pp. 222-225.

nature of the reality that caste presented helps us understand why the same objective resulted in somewhat different constitutional arrangements.

From the 1920s onward, due in large measure to the efforts of Ambedkar, *dalits* emerged as an independent political category. Their historical experience with discrimination and exclusion was novel. Ambedkar's writings betray various, often incompatible, points of view, experimenting as he did with different negotiating positions to safeguard the interests of lower caste groups. He nonetheless expressed a number of consistent beliefs. Among the most significant of his claims was that the caste system was artificial. The text of his 1936 speech, *The Annihilation of Caste*, charged the system with creating the "unnatural division of laborers into watertight compartments".[198] "In no other country", Ambedkar noted, "is the division of labor accompanied by this gradation of laborers".[199] Caste was, thus, not merely a division of labor but was also a division of laborers. The *unnatural* character of the institution meant, in the first instance, that the division was "not spontaneous" and "not based on natural aptitudes".[200] Rather than allowing people to choose their careers, the caste system was "an attempt to appoint tasks to individuals in advance, selected not on the basis of trained original capacities, but on that of the social status of the parents".[201] By being "based on the dogma of predestination", it prevented us from being ourselves.[202]

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[198] B. R. Ambedkar, *Annihilation of Caste*, 1944, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 1) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 23, p. 47.

[199] Ambedkar, *Annihilation of Caste*, p. 47.

[200] Ambedkar, *Annihilation of Caste*, p. 47.

[201] Ambedkar, *Annihilation of Caste*, p. 47.

[202] Ambedkar, *Annihilation of Caste*, p. 48.

But the system was also unnatural in a related but somewhat different way: it was not founded on any racial distinction. The caste system, in Ambedkar's reading, "came into being long after the different races of India had commingled in blood and culture".[203] There was no racial affinity, for example, between a Brahmin of the Punjab and one of Madras. Instead of depicting a difference between races, caste was a social division between members of the same race. To buttress this point, Ambedkar gave the example of sub-castes:

> If caste means race then differences of sub-castes cannot mean differences of race because sub-castes become *ex hypothesia* sub-divisions of one and the same race. Consequently the bar against intermarrying and inter-dining between sub-castes cannot be for the purpose of maintaining purity of race or of blood.[204]

The link between caste and race had been a notable feature in Indian political thought. In distinguishing between the two, Ambedkar was departing from the previous generation of anti-caste thinkers like Jotirao Phule. In his 1873 text *Gulamgiri* (Slavery), Phule had compared caste with race in America, referring to the treatment toward both lower castes and blacks as slavery. He argued that "the only difference between [lower castes in India] and the slaves in America is that whereas the blacks were captured and sold as slaves, the *shudras* and *atishudras* were conquered and enslaved by the *bhats* and Brahmins".[205] Independent of this fact, Phule saw no difference between both groups. A feature of both caste-based discrimination and slavery that Phule identified was its psychological impact

[203] Ambedkar, *Annihilation of Caste*, p. 49.

[204] Ambedkar, *Annihilation of Caste*, p. 49.

[205] Jotirao Phule, *Slavery*, in *Selected Writings of Jotirao Phule* (G. P. Deshpande ed., New Delhi: LeftWord, 2002) 22, p. 40.

on the victim. Like slaves in America, India's Shudras had come to accept the narrative of their own inferiority. They had not only been socialized into accepting their own condition but in resisting their liberation.[206] Phule felt that the "arguments of the Brahmins have been imprinted so firmly on the minds of the Shudras that they, like the negro slaves in America, oppose the very people who are willing to fight for them, and free them from the chains of slavery".[207] Ambedkar's writings are filled with similar explorations of the psychological burdens of inequality, but his view that race presented a misplaced analogy was crucial to the claim that caste was unique – in its invention and in its domination. One might note as an aside that although this was indeed an important, even radical claim, Ambedkar does not appear to have interrogated the very idea of race itself, unlike an emerging strand of anthropological thought at the time.[208]

For Ambedkar, showing that caste was an unnatural institution was crucial to arguing that it *could* be eradicated. The next stage in his argument was an explication of the problem that caste presented. Here Ambedkar drew a relationship between democracy, fraternity, and, inequality. The hallmark of the caste system was the status that it bestowed on different individuals. Those who belonged to particular caste groups were fated to choose occupations and perform their lives differently from those that belonged to others. Certain tasks and rituals were kept for members of lower caste groups; the performance of these tasks and rituals enforced and reinforced their lower status. What the caste system involved was not only differentiation but the registering of

[206] Phule, *Slavery*, pp. 31-2.

[207] Phule, *Slavery*, p. 38.

[208] The leading statement of such interrogation was, of course, Franz Boas, *Anthropology and the Modern Life* (New York: W. W. Norton and Co., 1928).

particular groups – and the tasks they performed and lives they lived – as less worthy than others. This compulsory status was undoubtedly a form of inequality, but for Ambedkar it was crucial to show that it was also fundamentally undemocratic.

Hindus, he observed in *The Annihilation of Caste*, do not constitute a society: "Men do not become a society by living in physical proximity any more than a man ceases to be a member of his society by living so many miles away from other men."[209] What prevented Hindus from being a society was a lack of communication, which resulted in preventing common activity and in sharing in one another's feelings and emotions. Caste kept people in "isolated pockets", and it was impossible for people to exit the caste system because of the caste group's right of excommunication.[210] In *Annihilation*, Ambedkar drew an analogy between *Chaturvarnya*, a schema that divided society into four classes, and Plato's *Republic*. The failure of both had the belief that men could be slotted into definite classes. In both, there was a rejection of individualism; and there was the absence of civic reciprocity. Ambedkar drew on Dewey's work on the interactive spirit of self-rule, and Thomas Carlyle's idea of "organic filaments" in *Sartor Resartus* in arguing that fraternity was essential for democratic life.[211]

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[209] Ambedkar, *Annihilation of Caste*, p. 51.

[210] Ambedkar, *Annihilation of Caste*, p. 53.

[211] Ambedkar, *Annihilation of Caste*, pp. 57, 65, citing *Democracy and Education: An Introduction to the Philosophy of Education* (New York: The Free Press, 1997 [1916]); Thomas Carlyle, *Sartor Resartus*, in *The Works of Thomas Carlyle* (Volume 1) (Henry Duff Traill ed., New York: Cambridge University Press 2010 [1896]), pp. 194-202.

In prior years, Ambedkar had similarly stressed the segregation that caste practices like endogamy perpetuated.[212] He has seen the "isolation of the groups that is the chief evil".[213] What political independence required was not only the absence of social divisions but more significantly a shared sense of community. It was communication, participation, and interaction between groups that created fraternity. In 1945, in an essay attacking the Congress and Gandhi, Ambedkar noted that India lacked the "endosmosis between groups" that had in Europe created "a society which can be depended upon for community of thought, harmony of purposes and unity of action".[214] Different caste groups in India were not merely "non-social"; they were actively "anti-social".[215] The institution of caste meant that individuals would not see one another as equal citizens; it would make modern democratic politics, understood as a means to a voluntary common way of life, impossible to achieve.

The interdependence of democracy, fraternity, and inequality was crucial to Ambedkar's thought, but it did not by itself assist in determining how one should respond to the problem of caste. In the colonial era, Ambedkar's primary concern was that restrictions on franchise had led to the de facto exclusion of lower caste groups. As a consequence, he poured his energy into seeing that lower caste groups receive some kind

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[212] B. R. Ambedkar, "Castes in India: Their Mechanism, Genesis and Development", 1916, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 1) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 3, p. 9.

[213] B. R. Ambedkar, Evidence before the Southborough Committee on Franchise, 1919, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 1) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 243, pp. 248-249.

[214] B. R. Ambedkar, *What Congress and Gandhi have done to the Untouchables*, 1945, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 9) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 1, p. 193.

[215] Ambedkar, *What Congress and Gandhi have done to the Untouchables*, p. 193.

of representation, and that their condition invites due attention. At the time, he flirted with numerous possible strategies to make this possible. In 1919, his submissions to the Southborough Committee included the interesting argument that rather than offer lower caste groups separate electorates or reserved seats, they should instead benefit from "a low-pitched franchise".[216] By making the franchise for the non-Brahmin even lower than the franchise for the Brahmin, "the Marathas would improve their position on the voters' list and the altogether favored position of the Brahmin would be equalized".[217] The disproportionate influence that Brahmins exerted could only be mitigated by reducing their influence in politics. He believed that both communal representation and reservations for lower caste groups could be avoided by the extension of franchise.[218] But he also suggested that communal electorates could enable "a new cycle of participation in which the representatives of various castes who were erstwhile isolated and therefore anti-social will be thrown into an associated life".[219]

Yet, speaking before the Simon Commission in 1928, he characterized the "depressed classes" as "a distinct and independent minority" and sought reserved seats if they were accompanied by the introduction of adult franchise.[220] In the absence of adult franchise, the demand was for separate electorates.[221] Communal electorates, he openly

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[216] Ambedkar, Evidence before the Southborough Committee on Franchise, p. 255.

[217] Ambedkar, Evidence before the Southborough Committee on Franchise, p. 255.

[218] Ambedkar, Evidence before the Southborough Committee on Franchise, p. 255.

[219] Ambedkar, Evidence before the Southborough Committee on Franchise, pp. 266-267.

[220] Report on the Constitution of the Government of Bombay Presidency, 1929, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 2) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 315, p. 465.

[221] Ambedkar, Report, Bombay Presidency, p. 465.

suggested, were "an evil" and "adult suffrage should be introduced not only because of its inherent good but because it can enable us to get rid of the evil of communal electorates".[222] Ambedkar denied that any community, such as Muslims, had special interests that were not shared by the general public. But even if such interests existed, he contended that they would be better served through a system of joint electorates. A system of communal electorates would condemn a minority to its allotted share. Under the joint system, however, much greater fluidity was possible.[223] He adopted the same position at the Roundtable Conference in 1930, declaring that "if you give us adult universal suffrage, the Depressed Classes … will be prepared to accept joint electorates and reserved seats; but if you do not give us adult suffrage, then we must claim representation through separate electorates".[224] In 1943, he called for the untouchables to be represented as a separate category.[225] He suggested here that separate electorates were "the only mechanism by which real representation can be guaranteed to the untouchables".[226] Whereas political majorities and minorities were "fluid bodies", the case of the Hindus and untouchables was different.[227]

As we can see, Ambedkar's stance on lower caste representation under colonialism varied a considerable amount. Yet, despite this variance, we notice the

[222] Ambedkar, Report, Bombay Presidency, p. 338.

[223] Ambedkar, Report, Bombay Presidency, p. 338.

[224] B. R. Ambedkar, First Roundtable Conference, 22 December 1930, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 2) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 501, p. 533.

[225] B. R. Ambedkar, *Mr. Gandhi and the Emancipation of the Untouchables*, 1943, in *Dr. B. R. Ambedkar: Writings and Speeches* (Volume 9) (Vasant Moon ed., New Delhi: Dr. Ambedkar Foundation, 2014) 389, pp. 403-404, 407.

[226] Ambedkar, *Mr. Gandhi and the Emancipation of the Untouchables*, p. 413.

[227] Ambedkar, *Mr. Gandhi and the Emancipation of the Untouchables*, p. 416.

repeated occurrence of two themes. The first was the view that the kind of protection and support that lower caste groups might require would at least in part turn on the franchise restrictions in operation. The calculation on behalf of such groups was consistently made by factoring in the extent of the franchise and the limitations placed on the right to vote. The second theme that persists throughout Ambedkar's engagement with the colonial state is the belief that a constitutional scheme cannot ignore the reality of caste. In one form or another, it would have to be addressed. Every constitutional system, he noted in 1945, had its own set of safeguards to provide. The checks and balances required in the Indian system were those that counteracted upper caste oppression.[228] "[S]elf-government and democracy become real", he argued, "not when a constitution based on adult suffrage comes into existence but when the governing class loses its power to capture the power to govern".[229] He had similarly stated, only a couple of years before in a speech on Ranade, Gandhi, and Jinnah, that the principal failure of India's politicians was the presumption that democracy was simply a form of government. He proposed an alternative understanding, and declared that a "democratic form of government presupposes a democratic form of society".[230] What this required, among other things, was "a social organization free from rigid social barriers".[231]

How such barriers were to be broken was a matter that came to be answered in the Constituent Assembly. With the introduction of adult suffrage, an opportunity arose for the caste question to be addressed in full. The question of representation was no longer

[228] Ambedkar, *What Congress and Gandhi have done to the Untouchables*, p. 171.

[229] Ambedkar, *What Congress and Gandhi have done to the Untouchables*, p. 203.

[230] Ambedkar, *What Congress and Gandhi have done to the Untouchables*, pp. 222-223.

[231] Ambedkar, *What Congress and Gandhi have done to the Untouchables*, pp. 222-223.

framed under conditions of restricted suffrage. The first order of business was a careful re-examination at the exact problem at hand. Here, what was crucial was the recognition that caste tendered a problem that was fundamentally distinct from that offered by religion. In the case of religion, the challenge was the balance between a common politics and distinct religious faiths. Here, one may loosely term the aspiration as accommodation. With regard to caste, however, the aim was not survival but extinction. The Framers envisioned a country where many religions could thrive, and one's identity as a political agent was not tied to one's religious affiliation. But, when it came to caste, the ambition was the end of the institution – the elimination of the group markers it created and the practices it encompassed. In the case of caste there was no group identity to protect; there were only group identities to dismantle.

The twin objectives of annihilating caste and securing the lower castes posed a puzzle for political representation. The explicit and specific recognition of caste threatened to make permanent an identity which Ambedkar and a number of other members in the Assembly had characterized as contingent. The schemes of descriptive representation under colonial rule had, after all, taken caste-based social practices and given caste identities a concrete and firm legal character.[232] Such an approach risked confirming this constructed identity, thereby putting in place an arrangement that would depart from the objective of annihilation. We can therefore see why the special recognition of caste might have invited concern. But why was such special recognition thought to be important in first place? What was inadequate about a policy of constitutional silence?

[232] See Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton: Princeton University Press, 2001).

The answer to this was that one constraint on individual liberty was the prevalence of forced identities. Unlike in the case of religion, the identities in the case of caste were both compulsory as well as hierarchical. The various caste groups were not merely different; they were categorically different. The problem with constitutional silence – that is, with indifference toward caste in the domain of the political – was that Indian society would remain untransformed, and the power of the upper castes would remain intact. Given the given the nature of social practices, it would be unlikely that voting behavior would yield lower caste representatives or be responsive to lower caste interests. Even though caste-based practices were in focus, the real concern here was that extra-political forms of power could dominate the sphere of the political. Pockets of concentrated economic or social power could, in other words, translate into political power. For the purposes of democratic politics, this meant that the inhuman authority that upper caste groups enjoyed over lower caste groups could infiltrate politics. For individual liberty to be realized, the stubborn practices of superior groups needed to be end. An individual could only come up for air when the force exerted by power groups was reduced. It was in this way that the constitutional tackling of dominant groups was seen as necessary for the individualization of identity.

Domination could occur where powerful, obstinate hierarchies existed. Seeing the problem through this lens – where domination was the problem – led to an effort at abstraction. A category of "backwardness" was developed, which could in principle be filled by any group but was of course at the time neatly applicable to the lower castes.[233]

[233] See Speech by Vallabhbhai Patel, Constituent Assembly of India, 14 October 1949, in *Constituent Assembly Debates* (Volume 10) *Constituent Assembly Debates* (New Delhi: Lok Sabha Secretariat, 2009 [1950]), p. 249.

The groups that one might regard as backward at any given moment would depend a range of socio-economic factors extant at the time. A mutable category like backwardness allowed for any group to be the subject of special treatment. The concept of backwardness, K. M. Munshi noted, "signifies that a *class of people* – does not matter whether you call them untouchables or touchables, belonging to this community or that – a class of people who are so backward that special protection is required in the services…".[234] The focus on backwardness shows that there was no particular group identity that Constitution sought to protect. This was not a measure to enable freedom *through* a group association. The fact that it was lower caste groups that needed protection at the time was seen as a contingent outcome. That there was no caste identity to protect, of any balancing between caste groups to be performed, is evidenced by the fact that the identification of beneficiaries was not undertaken in the Constitution but left to secondary legal measures (which would update with time), and that the preferential treatment toward caste groups at the Founding was seen as temporary.

For Ambedkar, the term "backwardness" aimed to reconcile equality of opportunity with the need to include particular communities in public life. The former principle held that "every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not".[235] Ambedkar recognized that, as far as many were concerned, a strict reading of this principle disabled any form of preferential

[234] See Speech by K. M. Munshi, Constituent Assembly of India, 30 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 697.

[235] Speech by B. R. Ambedkar, Constituent Assembly of India, 30 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 701.

treatment. But he acknowledged a contrasting perspective that "although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration".[236] Backwardness ensured, in the first instance, that any reservations would have to be sensitive to the equality of opportunity principle. So, for example, reservations would have to be "confined to a minority of seats" and if, say, reservations were made for seventy percent of public jobs and only 30 percent were left unreserved, such a proposal would be invalid.[237] This illustration captured the relative character of the term. Backwardness as an idea was intelligible only when placed alongside something less backward and the halfway mark signified the statistical mean that would make such relative judgments possible.

Another feature of backwardness is that it was meant to serve a "qualifying" role.[238] To receive preferential treatment, it was not enough to simply not belong to the majority. The Sikh community, for instance, were a numerical minority but they were denied special treatment because they were not backward with respect to other communities.[239] The sub-committee that considered the issue noted that the community did not suffer from any handicap, and could therefore not be eligible for any distinct

[236] Speech by B. R. Ambedkar, Constituent Assembly of India, 30 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 701.

[237] Speech by B. R. Ambedkar, Constituent Assembly of India, 30 November 1948, in *Constituent Assembly Debates* (Volume 7), pp. 701-702.

[238] Speech by B. R. Ambedkar, Constituent Assembly of India, 30 November 1948, in *Constituent Assembly Debates* (Volume 7), p. 702.

[239] See Report of a Sub-Committee appointed by the Advisory Committee on Minorities, Fundamental Rights etc., available in *Constituent Assembly Debates* (Volume 8), pp. 313-315.

treatment. Granting safeguards to the Sikhs would.[240] As one member noted, "The fundamental question is whether the Sikhs are a backward community either socially, educationally, or economically or even in any other sphere … they are not".[241] The question, to repeat the point, was the counteracting of dominant forces outside of the formal territory of politics; it was not about the preservation or protection of fragile communities.

The turn to backwardness also captured the difference between the problem of discrimination and that posed by representation. In 1930, at the First Roundtable Conference in London, Ambedkar had pointed out that the "Depressed Classes are not entitled, under present circumstances, to certain civic rights which the other minorities by law enjoy".[242] Here, he pointed to discriminatory practices in employment, the use of public spaces and public transport, the use of public utilities, and so on. With such practices in mind, Ambedkar demanded the outlawing of untouchability and an anti-discrimination regime.[243] At India's founding, this demand was met, and the elaborate bill of rights that Constitution adopted outlawed untouchability and contained a wide set of anti-discrimination provisions.[244] The concerns that Ambedkar voiced did not need

[240] Report of the Special Sub-Committee on Minority Problems affecting East Punjab and West Bengal, 23 November 1948, in *The Framing of India's Constitution: Select Documents* (Volume 4) (B. Shiva Rao ed., New Delhi: Universal Law Publishing, 1966) 590, pp. 592-593.

[241] Speech by Sochet Singh, Constituent Assembly of India, 23 November 1949, in *Constituent Assembly Debates* (Volume 11), p. 853. See also Speech by Vallabhbhai Patel, Constituent Assembly of India, 14 October 1949, in *Constituent Assembly Debates* (Volume 10), p. 249; Letter from Vallabhbhai Patel to Baldev Singh, 30 December 1948, in *Sardar Patel's Correspondence 1945-50* (Volume 6) (Durga Das ed., Ahmedabad: Navajivan Publishing House, 1973) 353, p. 354.

[242] Ambedkar, First Roundtable Conference, 31 December 1930, p. 530.

[243] Ambedkar, First Roundtable Conference, 31 December 1930, p. 532.

[244] There was a growing intellectual emphasis at the time on the role of constitutional rights in providing security to minorities like the lower castes. See, for example, C. Rajagopalachari, *Ambedkar Refuted*

resolution through special representation; they had been addressed through the recognition of rights. It may not be wrong to see this as capturing the relative substitutability between rights and representation: both can be viewed as mechanisms for the protection of weak groups.[245] Even though a certain functional similarity between rights and representation may exist, it should be seen that the phenomena of backwardness and discrimination were to an extent analytically distinct. A member of a backward group would be more likely to be the victim of discriminatory state action, but discriminatory state action that was without basis was a problem regardless of whom it discriminated against. Conversely, groups may be backward – say, as a result of economic alliances – without being subject to rampant discrimination. Such alliances would need dismantling because of their influence over the political process even if the laws that they generated satisfied anti-discrimination norms. Special representation for backward groups was not, in other words, an aid to anti-discrimination. Insofar as discrimination was a problem, it was met by the rights regime that was put in place. And the solution to discrimination would be a more effective rights regime. Here, as previously, abstraction helped to articulate the problem at hand. Discriminatory behavior based on caste raised concerns about unequal state action. A regime of rights could respond to such action regardless of whether or not the inequality, in any given instance, rested on caste prejudice.

(Bombay: Hind Kitabs, 1946), pp. 6-7. On link between anti-discrimination and representation, see also Report of the Committee of the All Parties Conference, 1928, in *Selected Works of Motilal Nehru* (Volume 6) (Ravinder Kumar and Hari Dev Sharma eds., New Delhi: Vikas Publishing House, 1995).

[245] See generally Daryl J. Levinson, "Rights and Votes", 121 *Yale Law Journal* 1286 (2012).

One final point may be made about this constitutional settlement. The ideological differences between Ambedkar and Gandhi on caste are familiar.[246] Both men were responsible for making caste a concern of national importance; both men strove hard for the abolition of untouchability. But whereas Ambedkar sought the explicit recognition of lower caste groups, Gandhi viewed special treatment as a form of segregation. Gandhi also resisted Ambedkar's reading of Hinduism, as exemplified by the exchanges that followed *The Annihilation of Caste*. The contrast was between Gandhi's internal approach to reform – internal both in the sense of the individual and in terms of Hinduism – and Ambedkar's call for structural reform. All of this is well-known, but for our purpose it is interesting to see the Constitution's eventual framework in light of this contest. Gandhi had feared that legal measures would engender rigidity, and that converting lower caste groups into a distinct statutory category would only further their exclusion.[247] The difference between Muslims and untouchables was that recognition in the latter case would result in the perpetuation of identity: "The Mussalmans will never cease to be Mussalmans by having separate electors. Do you want the untouchables to remain untouchables forever? Well, the separate electorates would perpetuate the stigma."[248] For Gandhi, the distinction between a de facto outcome and a de jure one was crucial. Future legislatures would do well to be entirely composed of lower castes, but the

[246] See generally D. R. Nagaraj, *The Flaming Feet: A Study of the Dalit Movement in India* (Bangalore: South Forum Press, 1993), pp. 1-30; Eleanor Zelliot, *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar Publications, 1992), pp. 150-183.

[247] See Mohandas K. Gandhi, "Hindu-Muslim Question", 19 February 1925, in *The Collected Works of Mahatma Gandhi* (Volume 26) (Government of India: Publications Division, 1967) 160, p. 162.

[248] Mohandas K. Gandhi, Speech at Indian Majlis, 24 October 1931, in *The Collected Works of Mahatma Gandhi* (Volume 48) (Government of India: Publications Division, 1971) 223, p. 223.

entry of such members should occur through the channels of politics.[249] It was Ambedkar rather than Gandhi who was responsible for the Constitution's final arrangement on caste, but this arrangement helps us notice that their shared discomfort with caste recognition in and of itself. It is sometimes suggested that the Constitution "mandated" caste-based reservations for lower caste groups.[250] But this is doubly wrong, because the Constitution permitted such measures and the description confuses a permissive legal rule with a mandatory one, and because it misreads the nature of beneficiary identification. The turn to an abstract constitutional principle meant that the special treatment toward lower castes was the *consequence* rather than the *object* of the constitutional arrangement.

The identities of religion and caste presented the most serious problem for the idea of citizenship in independent India.[251] The breakdown of Hindu-Muslim relations and Partition underscored the limitations of communal representation. This collapse came in conjunction with a fresh understanding of representation in a democratic polity, and of the meaning of agency under conditions of popular authorization. Part of the reason for the failure of communal representation was that it moved from having a non-territorial, functional character. Once it traversed into questions of territory, its internal logic had no resolution to offer. But the territorializing of communal representation was itself a

[249] Mohandas K. Gandhi, Speech at Public Meeting, 28 December 1931, in *The Collected Works of Mahatma Gandhi* (Volume 48) (Government of India: Publications Division, 1971) 446, p. 449. See also Mohandas K. Gandhi, Letter to P. N. Rajbhoj, 20 September 1932, *The Collected Works of Mahatma Gandhi* (Volume 51) (Government of India: Publications Division, 1972) 111.

[250] See Rao, *The Caste Question*, p. 23.

[251] In this work, I have not studied about the case of India's tribal population, whose condition also raised a number of questions for the conceptualization of citizenship. See Jayal, *Citizenship and Its Discontents*, pp. 234-245.

consequence of its conceptual structure. It was the next stage in the contestation between communities. Apart from its functional reality, communal representation came to be seen as limited for normative reasons: it would condemn citizens to predetermined, compulsory identities. A modern democratic state was a state where people had the power not merely to act under their political identity, but to determine their political identity. To be a citizen in such a state was to be a member of political world that could be made and remade.

When it came to both religion and caste, the Framers rejected a power-sharing conception of India; power was not meant to be divided between different groups. The prevalence of caste gave rise to a slightly different problem than religion. It shed light on the power of group identities to disallow individual liberation. The insistence of caste-based domination was so great that it could not be entirely solved by suffrage. The path to the individualization of identity, in instances where powerful group identities were to be destroyed, was found in allowing special treatment toward members of groups that suffered as a result of hierarchy. As power was a dynamic concept, the relative position and profile of groups would change. The determination of groups vulnerable to domination would be a function of changing realities; to hold otherwise would be a form of essentialism, for it would mean that some groups were doomed to being backward. The Constitution did not speak of any specific beneficiary or of any special group identity that needed preservation. With regard to both religion and caste, the Constitution put in place a schema that would release individuals from forces that determined their identity.

5

Conclusion: Democracy and Its Contents

The majority of the world's constitutions have been written in the past three decades.[1] The crafting of canonical legal texts has become as ubiquitous a political reality as the birth of nations.[2] But constitution-making in the age after colonialism has been more than merely widespread: it has been an enterprise to negotiate unfamiliar and uncertain waters. Unlike the constitutional revolutions of the late eighteenth century, whose public image still informs so many cries for liberation, contemporary revolutions have occurred in regions that are characterized by poor levels of growth and education, by intense cultural and social divisions, and by immediate rather than gradual democratization. For the makers of constitutions in such conditions, the world has not always offered assurance or promise. But what it can offer is some historical precedent. The Indian founding is a natural reference point for such constitutional moments, and part of the ambition of this dissertation has been to accord it its rightful place in the history of modern constitutionalism.

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[1] Lerner, who supplies this figure, is right to observe that the exact number of constitutions turns how we define constitutions and the criterion we follow to regard them as valid. See Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (New York: Cambridge University Press, 2011), p. 1 n.1. On constitutional longevity and the journey of written constitutions globally, see Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009).

[2] The emergence and spread of constitutions has become an important subject of scholarly inquiry. See generally Bruce Ackerman, "The Rise of World Constitutionalism", 83 *Virginia Law Review* 771 (1997). Ackerman is currently preparing a manuscript on the routes that different countries have taken in becoming constitutional states. For a brief statement, see Bruce Ackerman, "Three Paths to Constitutionalism – and the Crisis of the European Union", 45 *British Journal of Political Science* 705 (2015). For our purposes, one important theme in this burgeoning field of inquiry has been the meaning and practice of revolutionary constitutionalism. For a recent exploration, see Stephen Gardbaum, "Revolutionary Constitutionalism", 15 *International Journal of Constitutional Law* 173 (2017).

The historical role that I have sketched is no minor one. European liberalism in the nineteenth century was intoxicated by the faith that democracy could not travel where it pleased. Its existence and endurance was seen as dependent on historical and sociological prerequisites, which countries like India resolutely lacked. The Indian engagement with the ideological origins of empire was a direct response to these nineteenth-century concerns. As such, it marked a pivotal moment in the journey of the idea of democracy, not just because Indians turned to democracy in an unlikely terrain but because they offered a conceptual rejoinder to the imperial imagination. In this work, I have not tried to tell a new story about the political history of Indian independence. This history is surely noteworthy, and much can and has been said of the characters and events that challenged the colonial state. My interest has instead been to underline the theoretical foundations on which Indian democracy was predicated. Indians did not merely challenge the colonial state – they challenged the logic of colonialism.

In challenging the imperial ideology, there was one respect in which the revolutionaries bore an uncanny resemblance to the colonizers. The Indian nationalists and their oppressors both sought an enlightened politics. Their attack was not on Western modernity or the established ingredients of democratic constitutionalism. Indian nationalists fought for these alien ideals with fury and hope. Why should Indians, they frequently asked, be governed by an alternative understanding of freedom? Not all Indians accepted this, of course. Some took an instrumental view of state power, wanting to rush to outcomes without locating freedom in the routines of democratic rule. Some desired a less alien relationship with public authority, seeking a mirroring of the self where the state was not above citizens but like them. And some, such as Mohandas

Gandhi, expressed dissension in the most original of terms, turning away from the state and its structural imperatives.[3] These aspirations, seen variously as hegemonic, confining, atavistic, and impractical, were consigned to the margins. They left little imprint on the institutional imagery drawn by India's Constituent Assembly.

That imprint shared in the colonial understanding that democracy was not only about formalities at the ballot box, and that many of India's infirmities needed tackling for the fulfillment of self-government and the corresponding realization of freedom. It is a remarkable and underappreciated fact that Indian nationalism, in spite of its fervent attack on foreign rule, had the intellectual courage and perspective to acknowledge India's own inadequacies. Men like Jawaharlal Nehru and B. R. Ambedkar believed that many aspects of Indian society needed alteration; that they were perforated with forms of life where power was personalized, identity localized, and the sense of a collective all but absent. But where India's founders departed from the colonial ideology was in their diagnosis of this condition and in the remedy they prescribed. The path to an enlightened politics did not lie in an enlightened despotism. Rather, it lay in the practices of politics itself; the structuring of politics along desired lines would produce the politics that was desired.

This was a radical claim, radical in the sense that it would have altered Indian life in its most elemental aspects. It was a claim driven by the faith that Indians, like men and women elsewhere, were products of circumstances to which they were not doomed. The essentialism of the imperial mind was an act of extraordinary presumption. It granted

[3] The questioning of Western modernity on Indian soil found notable expressions in independent India. See, in particular, Jayaprakash Narayan, *A Plea for Reconstruction of Indian Polity* (Kashi: Akhil Bharat Sarva Seva Sangh Prakashan, 1959).

itself more knowledge of the social world than it was permitted to have. As Gandhi observed in *Hind Swaraj*,

> The English … have a habit of writing history; they pretend to study the manners and customs of all peoples. God has given us a limited mental capacity, but they usurp the function of the Godhead and indulge in novel experiments. They write about their own researches in most laudatory terms and hypnotize us into believing them. We, in our ignorance, then fall at their feet.[4]

To belong to the modern world was to resist such presumption. To progress beyond divine laws and divine rights was to see human life as contingent, as having the ability of being created. And a legal ordering was a way to enact reconstruction. Constitutions were, quite literally, constitutive, and determinism was charged with being the enemy of democracy. To think deterministically that Indians were of certain stripes, that they only acted on certain considerations, that their motivations were of a particular kind, etc., was to deny them the agency to act. If their behavior was already a settled matter, then there was no meaningful way in which they could be self-governing.

Even though my interest has largely been in placing the postcolonial constitutional moment within the experience of world constitutionalism, I should like to end on a more ambitious note. How might the Indian founding inform more contemporary concerns in political and legal theory? At the very least, the study that I have presented holds the promise of recasting a number of familiar debates. Consider, for example, the case of constitutional codification. Theorists, by and large, occupy one of

[4] Mohandas K. Gandhi, *Hind Swaraj*, in *Hind Swaraj and Other Writings* (Anthony J. Parel, Cambridge: Cambridge University Press, 1997 [1909]), p. 56.

two positions when it comes to written constitutionalism.[5] Some understand constitutional texts to be tools that control state power. Their interest lies in identifying how public power should and can be kept in check. Those who occupy this position are usually faced with reconciling restrictions on state power with popular rule. They might achieve this in many ways. For example, they could formulate a conception of democracy that rejects the "majoritarian premise".[6] The key point is such scholars are invested in the subordination of politics to law.

Others regard constitutional documents as enabling. Their effort is in instantiating rather than rejecting sovereignty. Political constitutionalists, as they are termed, are interested in the expression of popular sovereignty, and regard as mistaken the view that constitutionalism is necessarily limiting.[7] Unlike legal constitutionalists, they highlight the empowering features of constitutions: the establishment of institutions and the mechanisms for collective decision-making.[8] The challenge for such scholars lies in explaining why majoritarian decision-making should carry moral legitimacy, and they may in turn do so in numerous ways, such as by taking seriously the right to political participation and the phenomenon of political disagreement.[9] The difference between

[5] The contrast between both legal and political constitutionalism is often framed as the contrast between American and British constitutionalism, respectively. This is not without foundation but one should note that Britain has shared a more complex historical relationship with written constitutionalism than is often supposed. See Linda Colley, "Empires of Writing: Britain, America and Constitutions, 1776-1848", 32 *Law and History Review* 237 (2014).

[6] See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), pp. 1-38.

[7] See Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge: Harvard University Press, 2016), pp. 23-44.

[8] See N. W. Barber, "Constitutionalism: Negative and Positive", 38 *Dublin University Law Journal* 249 (2015).

[9] See Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

legal and political constitutionalists is often played out in the context of judicial review.[10] Those who view constitutions as limiting devices are often defenders of the right of judges to invalidate duly enacted legislation. The internal procedures of advocacy and principles of adjudication are seen as counterbalancing rules to those that inform politics. Political constitutionalists, on the other hand, question the special legitimacy of judges, and bemoan the disregard that judicial review displays toward the practices of representative institutions.

There is much that has been – and can be – said about these positions and their relative strengths and weaknesses. But whichever corner of the ring we are partial toward, we can notice how both schools of thought proceed on assumptions that do not obtain in many parts of the world. The case for political constitutionalism rests on well-functioning legislative institutions; on a number of practices and norms that relate to law-making and the enactment of legislation. Similarly, the case for legal constitutionalism is built in the context of prevailing canons of reasoning, principles that determine legal meaning, and interpretive techniques and approaches. For some nations in the West, it is not unnatural to ask whether judicial review is legitimate in a milieu of well-performing legislatures and courts. But for many other countries, the more pressing question is how they might arrive at such legislatures and courts. Their primary task is to establish the apparatus that can make the debate over legitimacy even possible – and the position on legitimacy that they ultimately adopt may well turn on which institutions are actually able

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[10] The scholarship here is too large to reference in any meaningful way, but for a recent iteration of this debate, see Jeremy Waldron, "The Core of the Case Against Judicial Review", 115 *Yale Law Journal* 1346 (2006); Richard Fallon, "The Core of an Uneasy Case for Judicial Review", 121 *Harvard Law Review* 1693 (2008); Mark Tushnet, "How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review?", 30 *Oxford Journal of Legal Studies* 49 (2016).

to perform better. This result is not one in which theory is sacrificed to empirical realities. On the contrary, it is one that invites the deepest questions over the relationship between political theory and politics.

In addition to recasting ongoing conversations, the Founding could make a further, more substantive intervention in current debates. As Indians responded to imperial political thought, they developed an outlook on democracy and its preconditions. Their endeavor necessitated a fundamental and fresh attempt at understanding democracy itself. Indians conceived of self-rule as constituted by three elements: the commitment to rules and processes; the centrality of an alien state; the identification of individuals as agents. Each of these three were not only internally coherent, they were mutually supporting. The imperial worry over Indian self-government had been a worry about the feasibility of a political community. The three ingredients that formed democracy were each paths to a collective political identity: codification was motivated by the desire to create common meanings; centralization was a tool to liberate relationships from localism and to turn their attention to common goals; and representation was a way to rescue individuals from mandatory groups and place them in a new, common pool of activity.

Our present outlook does, now and again, appeal to one or more of these themes, but we rarely see how each of them are interlocking parts in the larger quest for freedom. It is only their combined presence that can create both a shared public space and the room for private morality. And it is only their unity which can produce democratically-minded citizens out of the sometimes awful practices of democratic politics. This is not a unity that can, needless to say, unify all forms of human experience. The Indian Constitution did not embody any secular theodicy. There is no escaping misfortune, even within the

realm of the public.[11] There is also no special solution that the Indian founding offers for conflicts over constitutional principle. But what these interdependent pillars present is one conception of what it would take for politics – as a modern and normative ideal – to be alive and to work.

For the Framers, the contingency of one's political condition was a mark of possibility. But it was equally a warning of the fragility of any state of being. It is challenging to think of any major Indian figure who comprehended this as clearly as Nehru. In his seventeen years as India's first prime minister, he approached the exercise of public power with noticeable care, mindful that freedom once acquired could be easily lost. Nehru made sense of the repercussions of political action with a subtlety so detached from our practices that it can hardly be articulated.[12] The sustainability of India's constitutional project, he realized, would eventually rest on whether it could offer reasons for individuals to remain committed to that project. And the presence of those reasons turned as much on political action as on political belief. Indeed, much of the tragedy of contemporary politics, whether in India or elsewhere, is a certain belief in the permanence of our condition. It is the narrowing of imagination that makes us feel that there is no other way – that outcomes, whether they relate to our material well-being or physical safety, cannot coexist with egalitarianism and process; that the reality of conflict calls for social management rather than individual agency; that the idea of a collective political life is a fantastic myth. Such a narrative, where the actors have no capacity for

[11] See generally Guido Calabresi and Philip Bobbit, *Tragic Choices: The conflicts society confronts in the allocation of tragically scarce resources* (New York: W. W. Norton & Company, 1978).

[12] See generally Sunil Khilnani, "Nehru's Judgment", in *Political Judgment: Essays for John Dunn* (Richard Bourke and Raymond Geuss eds., New York: Cambridge University Press, 2009) 254.

self-transformation and the terms of politics are immune to alteration, may not only be tragic but also perilous. For it is worth remembering that freedom, in Nehru's time as in ours, has been endangered not only by extremism but perhaps even more so by cynicism and nihilism.

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