CONSTITUTIONAL PRINCIPLES IN INDIA: TEXT, CONTEXT & SUBTEXT

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ABSTRACT

India's Representation of the People Act, 1951 has long been a focal point of contentious debate. One provision in particular, the section concerned with "corrupt practices", has provided the Indian Supreme Court with multiple occasions to clarify and determine its reach and meaning. The specific objective of the provision – regulation of campaign rhetoric featuring sectarian religious appeals -- can be interpreted broadly or narrowly, with advocates on both sides of the question insisting that the well-being of electoral politics in India depends on their reading of the statute's underlying purpose. This article considers the Supreme Court's most recent interpretive effort at resolving the uncertainties surrounding the Act. It examines the alternative visions embodied in the majority and dissenting opinions, arguing that underlying the differing judicial renderings of the electoral law is a fundamental disagreement about how best to articulate Indian constitutional identity. Thus, the majority's broader interpretation of the election statute's speech restrictions fits comfortably within a standard paradigm of liberal constitutionalism, best exemplified by John Rawls' ideal of public reason; whereas the dissent's narrower construction has its roots in the socially reconstructive mission of the Indian Constitution. Both approaches evince genuine principled commitments, one focusing on the conditions most likely generally to advance the democratic goals of electoral competition, and the other devoted to the enhancement of prospects connected to the objective circumstances of the Indian socio/political predicament.

"*The corruption of every government generally begins with that of its principles*."
-Montesquieu

I. INTRODUCTION

When encountering a constitutional debate that focuses on the legal significance of a pronoun, one would surely be remiss in not exploring the more substantive layer of disputation that doubtless lies beneath the

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disagreement over a single word. For example, in an Indian case destined to become one of that nation's landmark constitutional rulings, a Supreme Court justice, D. Y. Chandrachud, reflected on the deeper argument behind the contested statutory meaning of "his."

> "*Underlying the surface of this case, are profound questions about the course of democracy in our country and the role of religion, race, caste, community and language in political discourse. Each of these traits defines identity within the conceptions of nationhood and citizenship*."[1]

Justice Chandrachud's was the dissenting opinion in a narrowly divided Court decision concerning the scope of India's governing electoral law, the Representation of the People Act (RPA), first enacted in 1951 and subsequently amended several times. Section 123 of the Act detailed a number of activities designated as "corrupt practices," the commission of which subjected the transgressor to serious legal consequence, including the reversal of a triumphant candidate's electoral success. Specifically, sub-section (3) makes it a corrupt practice for a candidate to enunciate an appeal "to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language." Earlier cases had addressed various matters related to the law's constitutionality and application; in this most recent judicial engagement with the terms of the RPA, a quorum of seven judges on the Supreme Court sought to settle an issue that had long been a bone of contention in Indian legal and political circles: whether the prohibition extended only to an appeal based on a candidate's own identity or more broadly to the identity of the audience to whom the appeal was directed.[2]

The justices in the majority adopted the broader understanding, but in doing so were similarly attentive to the larger issues that drove their dissenting colleagues to a divergent conclusion. The division on the Court in the case of *Abhiram Singh v. C. D. Commachen* is of critical importance to the conduct of elections in India, but in this article I examine the case's underlying concerns for their larger constitutive significance, and for their jurisprudential implications for an understanding and application of constitutional principles. As we will see, the justices' alternative visions of what it means to constitute a democratic polity incorporate

[1] Abhiram Singh v. C. D. Commachen, (2017) 2 SCC 629.

[2] In 1995, a three-judge panel of the Indian Supreme Court announced a series of judgments pertaining to the RPA, upholding as constitutional the section on "corrupt practices," and then applying the law in a way that produced mixed results in the specific cases under consideration. Known collectively as "the Hindutva cases," they served as the backdrop to the Court's re-engagement with the issue in 2017. The Court ruled that Balasaheb K. Thackeray, the leader of the extreme nationalist party, Shiv Sena, could be barred from electoral competition on the basis of intemperate campaign rhetoric targeting Muslims. But in companion cases the Court reversed findings against several other Hindu nationalist politicians, effectively blurring the distinction between religion and culture and insuring that the controversy over the RPA's application would continue.

contrasting types of principles: for the minority justices, principles embodying precepts of political morality rooted in a nation's past, whose meaning derives from experience within a specific political and cultural context; and for the justices in the majority, principles that make a claim of universality, such that the moral truths they are said to embody are precisely the ones whose recognition is required for a constitution to exist in more than name only.[3]

These principles are judicially deployed for the express purpose of defending, whether narrowly or broadly, governmental restrictions on the type of expression that are anathema to many champions of liberal democracy. Thus, Samuel Issacharoff begins his insightful and deeply informed study of the fragility of democratic self-governance with an observation that seems clearly right: "Elections are the sine qua non of democracy…."[4] What is also true, however, is that the configuration of a nation's electoral process does not and perhaps cannot conform to a specific model. As Issacharoff details in meticulous fashion, context matters, and so "independent of the ultimate act of casting a ballot," designers of such systems are unlikely to ignore the threats to democratic stability that could emerge from extreme ethnic, religious, and class divisions that in numerous societies long antedate the establishment of self-governing institutions. If this means adopting militantly protective measures – as, for example, the banning of political parties that are committed to the negation of democratic governance – then these blatantly intolerant methods will require a *principled* defense against the inevitable objection that they are unacceptable transgressions of democratic principles.

India famously has chosen to proceed in this way, but its approach has been retrospective not prospective, punishing office seekers whose political incitement has been deemed dangerous to democratic order rather than banishing from the electoral arena political organizations whose intentions are judged incompatible with this order. "While this is a type of sanction less onerous than the outright prohibition of a party, it paradoxically may raise more concerns about state censorship."[5] It thus places within the discretion of government officials the power to engage in viewpoint discrimination, which in some places, most notably the United States, is the occasion for exercising the highest degree of judicial oversight. Again, Issacharoff

[3] For an elaboration of this distinction, see Gary Jeffrey Jacobsohn, "Constitutional Values and Principles," in Michel Rosenfeld and Andres Sajo, eds., Oxford Handbook in Comparative Constitutional Law (Oxford University Press, 2012).
[4] SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 6 (New York: Cambridge University Press, 2015).
[5] *Id.* at 83.

is correct in noting, "It is ironic that the least restrictive form of electoral prohibition, one that does not require banning parties or individuals wholesale, is likely to have the most capacity for as-applied abuse."[6]

Since the enactment of RPA, it has fallen to the Indian Supreme Court to be the ultimate arbiter of whether a given enforcement of the law has indeed led to a constitutionally objectionable abuse. Over the years its justices have had numerous occasions to consider its meaning and application, *Abhiram Singh* being the most recent – and potentially most important – encounter with the mega-statute's terms.[7] While a comprehensive treatment of the problem of political/religious speech in India demands a detailed account of RPA's litigation history, the more limited ambition of this article requires only that the decision in the 2017 case be considered in relation to its most noteworthy progenitor from two decades ago, the still contentious *Hindutva Cases*. Controversially, the later decision scrupulously avoids what is most disputable in the 1995 companion cases – the question of whether the Court, even as it defended restrictions on religious speech, did so in a manner that essentially upheld the core beliefs of the Hindu right on the most fundamental of all questions, the nature of Indian national identity.[8] A majority in the 2017 case also reached a different conclusion on the pronoun question, reversing the earlier Court's narrow textual interpretation in favor of one that represented an expansion in the potential scope of RPA's restrictive provisions.[9]

The Court's refusal to reconsider the prior finding that a campaign speech predicated on the precepts of *Hindutva* was not a religiously based appeal for votes in violation of RPA but rather a more culturally oriented invocation of a "way of life" that was immune from its sanctions, could not obscure the essential agreement between the two Courts on the major point of principle advanced as a rationale for the law's limitations on free expression. In both instances recourse was to be found in principles of respectable

[6] *Id.* at 90.

[7] The case involved the appeal by a BJP politician who contested the set-aside of his 1990 election to the Maharashtra Assembly on the basis of a finding that he had used his Hindu religion to appeal for votes.

[8] In the earlier cases the Court reversed findings against a Hindu nationalist politician involving appeals to voters on the basis of the candidate's support of Hindutva, a term widely held to signify the religious faith of Hindus, but which the Court chose to interpret as referring to the culture and ethos of the people of India. I have written at length about this controversy. See Gary Jeffrey Jacobsohn, The Wheel of Law: India's Secularism in Comparative Constitutional Context (Princeton: Princeton University Press, 2003). See also, Brenda Kossman and Ratna Kapur, *Secularism: Bench-Marked by the Hindu Right*, 38 Economic and Political Weekly, 1996; and A. G. Noorani, *A Shocking Judgment with Selectivity in Quotation*, 5 Religion and Law Review, 1996. There is an echo of Noorani's scathing critique of the Court's rulings in the earlier cases in his reaction to the Court's refusal to revisit the Hindutva issue in its 2017 decision. See A. G. Noorani, *A Sad Betrayal*, FRONTLINE, Januray 27, 2017, http://www.frontline/in/the-nation/a-sad-betrayal/article9486946.ece?homepage=true.

[9] "To the extent that this Court has limited the scope of Section 123(3) of the Act in…Ramesh Yeshwant Prabhoo to an appeal based on the religion of the candidate or the rival candidate(s), we are not in agreement with the view expressed in [this decision]." Abhiram Singh v. C. D. Commachen, par. 46, Justice Lokur opinion.

liberal pedigree to justify the officially imposed expressive limitations permitted under the elections law. The same 1976 decision provided the justices in 2017 and 1995 with the argument that situated RPA's purpose within a Rawlsian philosophical framework, serving as well to connect the text of the law with what the justices understood to be the larger social and political context.

The problem is this: another principled rationale pointed in a very different direction, if not to the abandonment of governmental restrictions, then to their significant contraction as a threat to Indian constitutional identity. This rationale could also claim respectable lineage, perhaps most powerfully in the societally reconstructive intentions of the prevailing sentiments of the Constituent Assembly, but also in a landmark Supreme Court case that was revealingly singled out by the *Abhiram Singh* majority for its irrelevance to the issue before the Court. The two rationales are not incompatible with one another, and one can find in the opinions on both sides of the question acknowledgment of the reasonableness of the opposition's logic. In what follows I examine closely the two rationales and argue that choosing to prioritize one over the other hinges less on the quality of the reasoning inherent within them as it does on a preference for one kind of principle over another.

II. PURPOSIVE INTERPRETATION

Understandably, some of the reactions of interested observers to *Abhiram Singh* focused on what the Court's decision might portend for the health of politics in India. Critics of the majority's broader reading of the statute worried that its constraints on political debate would disproportionately work to the disadvantage of religious minorities' social and economic interests. Particularly in light of the *Hindutva Cases* precedent, which strongly implied that the religion of the majority was exempt from the election law's prohibition on campaign appeals not conforming to secular standards, the ruling could be seen as a new obstacle in the path of achieving social justice. Thus, an ostensibly neutral decision was anything but neutral. As Pratap Mehta wrote, "In fact, the Court seems to completely ignore the fact that the problem is not just that we invoke religion in politics. It is that what counts as, and gets defined as, religion is inherently political in the first place."[10] Such critics agreed with the dissenting opinion of Justice Chandrachud, who emphasized that the Constitution itself recognizes the intimate connection between

[10] Pratap Mehta, *High Principle, Dubious Law*, THE INDIAN EXPRESS, (January 4, 2017), http://indianexpress.com/article/opinion/columns/supreme-court-hindutva-case-representation-people-act-rpa-4457663/.

religion and politics. "[It] is not oblivious to the history of discrimination against and the deprivation inflicted upon large segments of the population based on religion, caste and language."[11] For this reason, "The 'his' in Section 123(3) cannot validly refer to the religion, race, caste, community or language of the voter."[12]

Defenders of the ruling were unpersuaded by this criticism. For them, "The law does not bar campaign speeches from referring to issues of discrimination on the basis of these grounds [religion, etc.]. It only bars 'appeals' on the basis of identity. Mere reference to these issues does not make it an appeal."[13] Instead, "The majority judgment's regulation of election speech is not only necessary to ensure free and fair elections and uphold the secular goals of the Constitution, but also needed to fulfill the constitutional goal of fraternity."[14] These defenders essentially embraced the logic of the justices in the majority and their confidence in the benign and well-intended purposes underlying the law. As one of these justices insisted, an interpretation of RPA that underscores its "wholesome[ness]" is consistent with its authors' purpose of "infus[ing] a modicum of oneness" into the scheme of representation.[15]

It is hardly surprising that with so much at stake in the effort to establish the meaning of a pronoun, the justices devoted ample attention to matters of jurisprudence, specifically whether and how judges should use what they know about a law's underlying purposes to explain the meaning of a particular word in a legal text, in this case "his." Supportive precedents and treatises were introduced by both majority and minority justices, neither side wishing to concede to the other the considerable advantage achievable through a convincing demonstration of statutory and constitutional intent.[16] Thus, textual interpretation required contextual interpretation to render meaningful the otherwise elusive import of the legislator's choice of words. And the context could be imagined in two aspirational ways: one that focuses on the conditions most likely generally to advance the democratic goals of electoral competition and one whose

[11] Abhiram Singh v. C. D. Commachen, Justice Chandrachud.
[12] *Id.* at 20.
[13] *How Justice Thakur Tilted the Scales in Key Case Banning Divisive Election Appeals*, THE WIRE, (January 3, 2017), https://thewire.in/law/justice-thakur-key-case-secularism-supreme-court-elections.
[14] Alok Prasanna Kumar, *Sectarian Appeal Judgment – Interpreting Representation of the People Act to its Intended Effect*, 52 Economics and Political Weekly (2017).
[15] Abhiram Singh v. C. D. Commachen, Justice Bobde.
[16] Examples from the majority: Bennion on Statutory Interpretation; R. v. Secretary for Health ex parte Quintavalle, 21[2003] UKHL 13; Union of India v. Raghubir Singh (Dead) by LRs., 28 (1989) 2 SCC 754; Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay, 34 (1974) 2SCC 402. Examples from the minority: Bennion on Statutory Interpretation; Kultur Singh v. Mukhtiar Singh, AIR 1965 SC 141 (1964).

specific concern is the enhancement of prospects connected to the objective circumstances of the Indian socio/political predicament.

As with the textual interpretive options, it was not necessary to choose between the contextual interpretive possibilities. But there is in the majority and dissenting opinions a decided difference in the emphasis each placed on the general or the specific, with the group giving a broad reading to "his" more inclined to pursue the first path, and the cohort favoring a narrow construction, the second.

With respect to the first approach, the Court's determined effort to minimize the ascriptive, sectarian presence in the conduct of elections relies heavily on the founding intention to create "a secular democratic republic where differences should not be permitted to be exploited."[17] This obligation to follow a secular course adheres to the vision set out in the *Hindutva Cases*, in which it was said that "the State has no religion and the State practices neutrality in the matter of religion."[18] According to Chief Justice Thakur, the "constitutional scheme" precludes "religion…play[ing] any role in the governance of the country which must all times be secular in nature."[19] The lead opinions in both cases made extensive use of the aforementioned 1976 decision, the dominant theme of which was that reasoned debate, "rational thought and action,"[20] should dictate electoral outcomes. "[S]ection 123, sub-sections (2), (3), and (3a) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution."[21] As in the *Hindutva Cases*, the 2017 Court's view of what constitutes a "corrupt practice" incorporates a normative perspective that largely relegates religion to the private domain, leaving the public space, specifically the arena of electoral competition, accessible only to discussion and debate that is untainted by the specter of passion-filled prejudice. "[R]eligion is a matter personal to the individual with which neither the State nor any other individual has anything to do."[22]

[17] *Id.* at 35, Justice Lokur.
[18] Prabhoo v. Kunte 1 Sup Ct 130 (1996), 147.
[19] Abhiram Singh v. C. D. Commachen, Chief Justice Thakur.
[20] Abhiram Singh v. C. D. Commachen, Justice Lokur, quoting Ziyauddin Burkhharrudin Bukhari v. Brigmohan Ramdass Mehra & Ors., 1975 SCR 453.
[21] *Id.*
[22] Abhiram Singh v. C. D. Commachen, Chief Justice Thakur.

This normative perspective is not lacking for constitutional justification in the realities of Indian history. The Constitution, after all, was adopted against a backdrop of sectarian violence that was only the latest chapter in a complex centuries old story of religious and ethnic aggression on the Asian subcontinent. To be sure, much of that history had been marked by peaceful co-existence; nevertheless, the bloodbath that accompanied Partition reflected ancient contestations, insuring that the goal of communal harmony would be a priority in the constitution-making process. Therefore, the Representation of the People Act and its various amendments could reasonably be depicted, as was done by the majority in *Abhiram Singh*, as the natural extension of a constitutional logic embedded in the lessons of painful and heart-rending experience. Text and context were thus in agreement.

Indeed, the burden of the argument strenuously advanced by the Court was that the series of changes to the original election law, including the use of the word "his" before "religion" in the amended provision, manifested a guiding purpose, namely "to enlarge the scope of corrupt practice."[23] Whether intended by the Court or not, the effect of doing so was to *constrict* the scope of political debate,[24] thus lending credence to the severest criticism of the decision, that consciously or not, it was a judgment biased in favor of the status quo.

But what might lead someone to conclude that expanding corruption's scope embodies a built-in bias against interests in India seeking to elevate their social condition? Consider that there is nothing in the dissent suggesting that the Court had been willfully antagonistic towards minorities or the oppressed; for, example, Justice Chandrachud accepted the determination not to revisit the earlier dictum that Hindutva was a "way of life." The problem with the majority's expansive interpretation of RPA was not that it betrayed malevolent designs towards any segment of the body politic, but that internal to the legal broadening of the scope of statutory application was a countervailing political dynamic that resulted in a systemic bias against historically disadvantaged groups. As the American political scientist, E. E. Schattschneider, argued in a classic work, "The most important strategy of politics is concerned with the scope of conflict."[25]

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[23] *Id.* at 8.

[24] Unsurprisingly, this was not held by the Court to be a violation of the constitutionally protected right of freedom of speech and expression (Article 19).

[25] E. E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 3 (Hinsdale: Dryden Press, 1975).

To be sure, the dissenting opinion does not reference any works of political science, but its finding that the text and context of the election law require a narrow application of the contested pronoun's meaning is consistent with Schattschneider's analysis of "the scope and bias"[26] of the political system. His theory maintained that when conflicts are conducted within a narrow scope – what he labeled the "privatization of conflict" – many people, specifically society's "have-nots," end up with their interests inadequately represented. The analysis had a particular focus on the upper-class business bias of the pressure group system in the United States, but its tenets were equally applicable to "the civil rights of repressed minorities."[27] Thus, history teaches that every expansion in the scope of conflict, i.e., the extent to which the "audience" – one embodiment of which is the electorate -- becomes involved in the conflict, translates into a heightened possibility that the grievances and concerns of the relatively powerless will get addressed. In essence, politics in this account may be conceived as an ongoing struggle between forces wishing to socialize conflict and those seeking its privatization, the latter determined to limit social change and hence maintain the status quo.

Such an understanding is recognizable in the dissenting opinion's interpretive moves. "Social mobilization is a powerful instrument of bringing marginalized groups into the mainstream. To hold that a person who seeks to contest an election is prohibited from speaking of the legitimate concerns of citizens that the injustices faced by them on the basis of traits having an origin in religion, race, caste, community or language would be remedied is to reduce democracy to an abstraction."[28] That this alleged prohibition is in fact an inevitable consequence of the Court's holding is contestable. Still, Justice Chandrachud resolutely believed such to be the case, which is why he insisted that only a narrow interpretation of 'his' in Section 123(3) could fulfill both statutory and constitutional purpose. What is more, by claiming that the contrary view would be tantamount to reducing democracy to an abstraction, Chandrachud's critique of this position very much resembles the argument advanced in Schattschneider's book, which is subtitled "A Realist's View of Democracy in America." Thus, realism in the Indian context must guard against "sanitiz[ing] the electoral process from the real histories of our people grounded in injustice, discrimination, and suffering."[29]

[26] *Id.* at 20.
[27] *Id.* at 8.
[28] Abhiram Singh v. C. D. Commachen, Justice Chandrachud.
[29] *Id.*

This realistic account of what democracy requires cannot be divorced from what secularism requires. To the degree that injustices connected to religion are brought within the broad scope of what may be discussed in the public arena of electoral disputation, the spiritual domain will have effectively been separated from its secular counterpart. Relegating religion to the realm of the private is of course a familiar phenomenon in the structuring of church/state relations in many societies. Indeed, the majority invoked the strict separation of church and state as the model dictated by the constitutional commitment to religious neutrality. Thus, the Chief Justice wrote:

> "*[A]n interpretation that will have the effect of removing the religion or religious considerations from the secular character of the State or state activity ought to be preferred over an interpretation which may allow such considerations to enter, affect or influence such activities. Electoral processes are doubtless secular activities of the State. Religion can have no place in such activities for religion is a matter personal to the individual with which neither the State nor any other individual has anything to do.*"[30]

The assumption that religion can be distilled from the public sphere is perhaps the most significant point of disagreement between the majority and minority justices in *Abhiram Singh*. By personalizing religion and effectively walling it off from the reach of public concern and state intervention, the Court has essentially chosen to align itself with the dominant separationist model in the West, where, as the American experience illustrates, it is widely considered reasonable for the government to maintain a posture of indifference toward something – religious life – that is widely perceived as only marginally implicating the totality of one's temporal existence. In contrast, the dissenters' very different view about the desirability of consigning the spiritual life to the private realm stems from an alternative perception of the role of religion, seeing it, in India at least, as a much more significant factor in structuring the lives and relationships of people. Consequently, where faith and piety are more directly inscribed in routine social patterns, justices and other political actors cannot avoid the perilous vortex of theological controversy as conveniently as their counterparts elsewhere. As a future Supreme Court justice said in remarks made at the Constituent Assembly, "[Y]ou can never separate social life from religious life…."[31]

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[30] Abhiram Singh v. C. D. Commachen, Chief Justice Thakur.

[31] Justice Alladi Krishnaswami Ayyar, Constituent Assembly Debates, Government of India Press, Vol. 2, 266. The entrenched character of religion in the social fabric of Indian society is widely accepted in a variety of literature, those populated by social theorists, India specialists, Indian commentators, and legal scholars. In all of these there is a broad consensus highlighting the profound extent to which the religions of India – in particular, Hinduism – are solidly embedded in the existent social structure.

To put this in more starkly political terms, if it is the case, as the dissenters argued, that broadening the scope of Section 123(3) would have the effect of narrowing the terms of political discourse, then in a polity where religion is thickly constituted (i.e., where it is consequential for the structural configuration of the society), a judicially mandated requirement of separation and privatization can be expected to harm the prospects of those mobilizing for major social reform. Following Schattschneider, we would also expect that groups and interests opposed to such an agenda would seek to limit the scope of conflict by adopting policies and legal strategies to maintain their dominant position in society. Anyone who has studied the issue of race in the United States will recognize the form that this takes, as African-Americans intent on emerging from the subjugation imposed on them by slavery and its Jim Crow legacy confront an opposition determined to contain the conflict by preventing it from reaching a national level of concern and action. Hence, the historic nexus between states' rights and racial discrimination.[32]

The significance of the American federalism debate is analogous to the church/state dispute in India, in the sense that frequently well-intended people lacking any discriminatory or malign purpose will find themselves among the supporters of states' rights in the first case and strict separation in the second. There is no reason to think, for example, that the dissenters in *Abhiram Singh* thought anything other than that their colleagues on the opposite side were principled supporters of a defensible constitutional commitment to secularism, for whom religion is a matter personal to the individual with which neither the State nor any other individual has anything to do. Still, it would be naïve to think that people with very different intentions would not see in the most recent RPA decision an opportunity to appropriate liberal principles for their pursuit of illiberal ends. As Cossman and Kapur have noted with respect to the embrace of Western norms of liberal democracy by Hindu nationalists, "The discursive strategies of the Hindu right have been based on bringing a very particular understanding of equality to the popular understanding of secularism, with powerful results."[33] A strict separationist stance entails, in its most

[32]Does the reach of constitutional principles extend beyond the public domain to order relationships and conduct in the strictly private sphere? The privatization of conflict and racial discrimination are also evident in the embrace of the "state action" doctrine, in which principles that require government to eliminate discrimination do not apply within the purely private realm. Here again the issue of race in the United States looms large in assessing the constitutive significance of a constricted application of principles.

[33] Brenda Cossman and Ratna Kapur, *Secularism: Bench-Marked by the Hindu Right*, 38 Economics and Political Weekly (1996), 2622. In an interview with the author a few years after the Hindutva Cases, Arun Shourie, the leading theorist of the Hindu right, indicated his enthusiasm for the First Amendment jurisprudence of the United States, saying, "I am for the American way in Church/State relations." (Interview conducted on November 19, 1998 in New Delhi, India.) Shourie accepts the reality of the thickly constituted character of Indian religious belief and practice. Acceptable too is the likelihood that important areas of

theoretically refined articulation, a commitment by the State to take minimal cognizance of religion in its officially sponsored acts. Such formal indifference to religion conveniently impedes social reconstruction, rendering suspect the effort to single out regressive religious practices for special statutory and administrative attention. Thus, in line with the perceived requirements of American-style First Amendment jurisprudence, caste and gender issues having a special connection to particular faiths would have to be removed from the public agenda.

III. PRINCIPLES & IDENTITY

Sometimes what is not addressed in Supreme Court opinions is as important as what is addressed. In his lead opinion in *Abhiram Singh*, Justice Lokur, quoting from an earlier decision, wrote: "[N]othing in the decision of *Bommai v. Union of India* is of assistance for construing the meaning and scope of sub-sections (3) and (3-A) of Section 123 of the Representation of the People Act. Reference to the decision in *Bommai* is, therefore, inapposite in this context." And then, "However, it must be noted that *Bommai* made it clear that secularism mentioned in the Preamble to our Constitution is a part of the basic structure of our Constitution."[34]

Of course, to the degree that *Bommai* was notable for having added secularism to the list of exclusively secured constitutional commitments designated for placement under the protective umbrella of the "basic structure" doctrine, it was actually quite apposite for determining the scope and meaning of the contested section. Although the constitutional and statutory issues in that landmark case did not directly concern the ambiguities and uncertainties of RPA, what was "made clear" in *Bommai* – the meaning of secularism as it might best be construed in the Indian context – surely has the potential for illuminating the core issues of principle that were in play in *Abhiram Singh*.

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public policy will embody the substance of religious beliefs, at least those of the majority. So understood, secularism appears in the form of a radical majoritarianism in the service of an assimilative agenda, in which those in power have been extended an implicit license to impose the norms and practices of the dominant culture on the rest of society.

[34] Abhiram Singh v. C. D. Commachen, Justice Lokur. The quote is taken from Mohd. Aslam v. Union of India. Interestingly, the quote was from Justice Verma who, in one of the Hindutva Cases, Prabhoo v. Kunte, had instructed the attorneys arguing the case not to argue Bommai. For a fuller discussion see, Gary Jeffrey Jacobsohn, The Wheel of Law: India's Secularism in Comparative Constitutional Context, 198-99.

The issue that *was* of direct concern in *Bommai* -- the authority of the central government to dismiss several duly elected state governments for failure to comply with constitutional machinery – was precipitated by the destructive work of fanatical religious nationalists intent on building a Hindu State on the debris of a Muslim mosque. As the Indian legal scholar, S. P. Sathe, rightly pointed out, the Court's decision represented "a warning to the Hindu right and organizations that entertained the idea of a majoritarian Hindu state that any move in that direction towards constitutional amendment would be considered a violation of the basic structure of the Constitution."[35] How so? According to one of the justices, "The Constitution has chosen secularism as its vehicle to establish an egalitarian social order…. Secularism, therefore, is part of the fundamental law and basic structure of the Indian political system…."[36] And as amplified by another justice, "[The Constitution's] material provisions are inspired by the concept of secularism. When it promised all the citizens of India that the aim of the Constitution is to establish socio-economic justice, it placed before the country as a whole, the ideal of a welfare state."[37]

To be sure, these sentiments were not incompatible with the 2017 Court's purposive interpretation of the election law's corrupt practices provision. There, as we have seen, the majority justices emphasized reasoned discourse and communal harmony in affirming the law's underlying benign intentions. And it is easy to see why, for ideally a secular democracy should strive to mitigate the passions that too often trigger the violent discord of religious differences. While compatible, however, the dissenters' reliance on the ameliorative understanding of secularism so prominently featured in *Bommai* contrasts sharply with the more generic presentation highlighted in the majority's rendering of this constitutional commitment.[38] Both of the approaches in *Abhiram Singh* pursue a principled jurisprudential path to their respective conclusions concerning the scope of RPA, but the principles themselves are distinguishable in terms of their scope; thus, the majority's deployment is more universal in its aspirations, less tethered to the specifics of place, whereas the dissent's has a decidedly particularistic emphasis, connected more to commitments that manifest critical aspects of a nation's constitutional identity. The first orientation invokes principles of justice that transcend sovereign borders, the second appeals to principles embodying a certain sovereign distinctiveness reflective of the local environment and its unique history and traditions.

[35] S. P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (New Delhi: Oxford University Press, 2002), 98.
[36] S. R. Bommai v. Union of India, (1994) 3 SCC 1.
[37] *Id.* at 234.
[38] For a detailed discussion of "ameliorative secularism" see Gary Jeffrey Jacobsohn, The Wheel of Law, 91-124.

What is at stake here may be of only incidental interest to those immediately impacted by the decision in *Abhiram Singh*, but it is central to the concerns of comparative constitutional theory. Thus, in *Taking Rights Seriously*, the powerfully influential work on legal theory written forty years ago, Ronald Dworkin argued: A principle "is a standard to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."[39] Principles, according to this account, are necessary for proper resolution of constitutional questions, although their application by judges does not require a particular result in a given case. Their conceptualization must, in other words, be distinguished from any reasoning that is predicated on utilitarian calculation. Closely related to this idea is that a critical attribute of principles is their special connection to individual rights rather than collective goals.[40] Unlike principles, the latter "encourage[s] trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole."[41]

What familiarity with comparative experience reveals, however, is that this tight nexus between principles and individual rights is not a universal fixture in the constitutional domain; consider, for example, Ireland's "principles of social policy" (Article 45 of that country's constitution), and, more germane to the claims in this article, India's "Directive Principles of State Policy." The pursuit of policies by the governing institutions in these polities is consistent with a principled view of policy-making in which the achievement of collective goals need not be framed in purely transactional and utilitarian terms, but as the fulfillment of the broader animating principles of the regime. Thus, Dworkin's insistence that "[a]rguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole"[42] is not *in principle* incompatible with a principle-based argument.[43] To be sure, attainment of the goals established by these constitutionally inscribed state policy directives is necessarily an incremental, cumulative process, and there are certain to be political and economic trade-offs along the way. Yet in contrast to the strict Dworkinian distinction between principles and policies, in which the achievement of such non-individuated goals would technically be lacking a principled basis, a

[39] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (Cambridge: Harvard University Press, 1977).
[40] "Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal." *Id.* at 90.
[41] *Id.* at 91.
[42] *Id.* at 82.
[43] The German constitutional theorist, Robert Alexy, has made this point very well. With specific reference to Dworkin, he argues, "Without doubt, the distinction between individual rights and collective interests is important. But it is neither necessary nor desirable to tie the concept of a principle to that of an individual right. The common logical characteristics of both types of principle…make a wider concept of principle appear more suitable." Robert Alexy, A Theory of Constitutional Rights 66 (Oxford: Oxford University Press, 1986).

constitutionally driven decision to improve the average welfare of members of the community is not only a principled one but also one expressive of abiding and deeply entrenched properties of constitutional identity.

What becomes increasingly clear, then, is that within the *Abhiram Singh* Court the alternative judicial renderings of RPA are linked to fundamental differences about how best to articulate Indian constitutional identity. The majority's broader interpretation of the election statute's speech restrictions fits comfortably within a standard paradigm of liberal constitutionalism, best exemplified by John Rawls' ideal of public reason; to wit: "[I]t is normally desirable that the comprehensive philosophic and moral views we are wont to use in debating fundamental political issues should give way in public life."[44] This ideal "hold[s] for citizens when they engage in political advocacy in the public forum, and…for how citizens are to vote in elections when constitutional essentials and matters of basic justice are at stake."[45] Consistent with the theoretically driven aspirations to a just political order that inspire this Rawlsian sentiment, the controversial outcome in *Abhiram Singh* can be defended as a reaffirmation of the normative ideal epitomizing liberal constitutionalism's exaltation of the unencumbered individual.[46]

But it can also be found wanting for its failure to provide an adequately textured account of the distinguishing features of the Indian constitutional experience. However much an appeal to voters on the basis of religious considerations may threaten generic principles of constitutionalism, the transformative aspirations and ambitions of Indian constitutionalism means that the legal proscription of such appeals tacitly incorporates a logic in tension with the ameliorative secular requirements of the local constitutional context. If not explicitly stated in the dissenting justices' opinions, this critique emerges quite clearly from their assertions about the likely problematic impact of a statutory construction that would broaden the scope of the RPA's punitive sanctions. Indeed, their concerns about this projected impact amounts to a counter-Rawlsian rejoinder, or at least a claim that the norms of public reason require framing in such a way that culturally specific iterations are given their due. In this alternative account, the neutrality of political liberalism is implicitly called into question; instead, as delineated in the Constitution, the alignment

[44] JOHN RAWLS, POLITICAL LIBERALISM 10 (Columbia University Press, 1993).
[45] *Id.* at 215.
[46] For a discussion and critique of this idea, see Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy (Harvard University Press, 1996).

of the Indian State with a socially reconstructive mission argues against silencing religiously tinged campaign rhetoric that might include hopes, plans, and mobilization for a redress of grievances.[47]

CONCLUSION

In his seminal treatise on constitutional rights, Robert Alexy argued, "[P]rinciples are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities."[48] Among the challenges presented by the prevailing reality of law and fact is the possibility that principles will be in competition with one another.

> "*If two principles compete, for example if one principle prohibits something and another permits it, then one of the principles must be outweighed. This means neither that the outweighed principle is invalid nor that [unlike in the conflict of rules] it has to have an exception built into it. On the contrary, the outweighed principle may itself outweigh the other principle in certain circumstances. In other circumstances the question of precedence may have to be reversed.*"[49]

The case of *Abhiram Singh v. C. D. Commachen* is illustrative of Alexy's argument. The debate among the justices concerned the meaning and application of a provision of the Representation of the People Act, with special attention given to the interpretive implications of a pronoun. Coincident with this legal dispute over the conduct of elections in India, but proceeding on a higher plane of generality, the contest featured an argument about the applicability of competing principles to the case at hand. The challenge confronting the justices was not that of choosing between mutually exclusive options; rather, it was about the prioritizing of principles in light of an assessment of their relative weight in the advancement of seemingly harmonious constitutional objectives.

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[47] It must be understood, however, that the same openness to such rhetoric can lead to results quite antagonistic to the goal of social reform. Thus, the spirit of Hindu nationalism has historically been nurtured by high caste Hindus who have been notable in their insensitivity to India's downtrodden. As Christopher Jaffrelot has pointed out, "Hindu nationalism…largely reflects the Brahminical view of the high caste reformers who shaped its ideology." Christopher Jaffrelot, The Hindu Nationalist Movement in India (New York: Columbia University Press, 1995), 13. Thus, the social mobilization imagined by the dissenters in the widening of the scope of political disputation could very well enhance the political prospects of a movement whose goals are anything but socially transformative.

[48] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47 (Oxford University Press, 1985).

[49] *Id.* at 50.

If there is anything incompatible about the constitutional goals of peaceful co-existence and social justice it lies not in their potential dual fulfillment. Nor does the recognition of one of these goal's desirability diminish the attractiveness of the other. Such, at least, is the indisputable conclusion one would doubtless reach if these aspirations were abstracted from the socio/political contexts in which constitutional deliberation inescapably occurs. Yet, as is evident in the Indian constitutional experience, easy fulfillment of these desirable ends amidst the circumstances of the world as we know it does not come easily. Indeed, that sobering reality is reflected in the majority and dissenting opinions in *Abhiram Singh*, both of which take their bearings from equally compelling, constitutionally grounded, secular commitments. On one side, an emphasis on reasoned discourse and communal harmony, on the other, an insistence on achieving more egalitarian outcomes; however much in theory they look to be mutually reinforcing attributes or visions of a healthy secular democratic order, in practice they are very much in competition with one another.

In its role as arbiter of the meaning and scope of India's governing elections law, the Supreme Court has tellingly encountered the "question of precedence" adverted to by Alexy. Thus, the public reason principle, a staple of liberal prescriptions for constitutional governance, led the justices in the majority to uphold extensive prohibitions on "something" (speech of a certain kind), while the egalitarian principle, a norm inextricably tied to a widely held and deeply rooted understanding of Indian constitutional identity ("the central theme of the Constitution to produce a just social order"), pushed the minority justices to frame an argument to permit this very same thing. In weighing the two principles differently, all the justices were nevertheless in agreement with what Justice Lokur said of the law they were interpreting: "The Representation of the People Act is a statute that enables us to cherish and strengthen our democratic ideals."[50] Their disagreement, a dispute over constitutional priorities, can only make sense within the broad parameters of that agreement.

[50] *Supra* note 34.