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The Law of Constitutional Characterization

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THE LAW OF CONSTITUTIONAL CHARACTERIZATION

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Abstract — Independent courts express what is law, but cannot enforce their judgments. When announcing limits on what those in power can do, constitutional courts have cause to give the most convincing reasons they can for those in power to defer to the courts' judgments. Where a written constitution has become widely accepted to embody and implement the will of the people, courts may strengthen the moral support for their judgments by grounding those judgments as deeply as possible in the constitution's text. Where a written constitution distributes power between levels of government by enumerating and assigning subjects of power, courts may strengthen the practical support for their judgments by grounding those judgments as deeply as possible in the indispensable umpiring role that courts derive from the constitutional distribution of power. Where a written constitution enumerates subjects of power but does not elaborate on what relation to those subjects governing acts must have to fit within those powers, the written constitution requires dispute resolvers to create a law of constitutional characterization to settle the actual distribution of power between governments. In creating that law, courts can use their written constitutional mandate to create an implied bill of rights.

I. INTRODUCTION

When independent courts issue judgments about what the law lets the powerful do, those courts always have an unspoken reason to ask: what will make the powerful obey? At the American Founding, Alexander Hamilton famously observed that courts do not exercise the force of the community,

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just its judgment.[1] What connects a court's judgment to that court's community in a way that commands the attention of the enforcers, and of everyone else? In India, there is the text of a Constitution. The lurking "why will they obey?" question is a compelling reason for constitutional courts to ground their decisions as deeply and convincingly as possible in constitutional text. Constitutional text integrates constitutional courts' decision-making with the post-Enlightenment commitment to popular sovereignty. And constitutional text in India makes the constitutional court's decision-making indispensable by apportioning power between levels of government in a way that turns the Supreme Court of India into the umpire between the nation and its regions.[2]

Deciding the distribution of power gives India's Supreme Court another way to recognize and protect human rights. The "golden triangle" of express rights protections in India's Constitution[3] is complemented in an under-appreciated way by the breadth of discretion that the Constitution gives the Supreme Court to decide what governments can do under their constitutionally enumerated powers. The Constitution's express limiting of governments through its enumeration of powers requires the Supreme Court to create a whole body of law – the law of constitutional characterization. *Interpretation* of enumerated powers involves asking what the words describing power mean – for example, what counts as "trade and commerce"? *Characterization* of governing actions involves asking what *relations* to enumerated subjects of power are necessary or sufficient to bring those governing actions within power. For example, to

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1 'The Federalist 78' in John P Kaminski and others (eds), *The Documentary History of the Ratification of the Constitution* vol 18 (1976) 87, 88 ('Documentary History').

2 "Federalism has been the one most decisive factor for the establishment of constitutional adjudication. For Dicey, 'federalism, lastly, means legalism — the predominance of the judiciary in the Constitution' and according to Kelsen, 'the institution of the constitutional tribunal achieves legally the political idea of federalism'." — Andreas Auer, 'The Constitutional Scheme of Federalism' (2005) 12 Journal of European Public Policy 419 citing Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1959) 175 and Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit* (De Gruyter 1929) 81. *See also*, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (HUP 2004) 32; Keith Whittington, *Political Foundations of Judicial Supremacy : The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press 2007) 86, 106; Laurence Claus, 'Federalism and the Judges: How the Americans Made Us What We Are' (2000) 74 Australian Law Journal 107; Laurence Claus, 'Constitutional Guarantees Of The Judiciary: Jurisdiction, Tenure, And Beyond' (2006) 54 American Journal Of Comparative Law 459, 482-83; Barry Friedman and Erin F Delaney, 'Becoming Supreme: The Federal Foundation of Judicial Supremacy' (2011) 111 Columbia Law Review 1137.

3 "Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31-C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual." — *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625 [74] (Chandrachud, CJ).

be within a power to make laws with respect to trade and commerce, does a governing action have to address actual instances of trade and commerce, or have certain kinds of effects on trade and commerce, or have certain kinds of purposes, or meet a combination of criteria that may include some or all of these and others? The Constitution's text necessarily calls for the Court to make India's law of constitutional characterization. The Constitution confers on the Court a discretion to decide what criteria must be met to bring governing actions within constitutional power. In exercising that discretion, the Court could draw forth its vision of human rights more fully and clearly from the written Constitution. The Court could do this by including respect for human rights among the criteria that determine whether governing actions are "with respect to" enumerated powers.

India's Supreme Court, like its federal counterparts elsewhere, reviews the validity of government action through two steps. First, the Court asks whether the challenged action falls within an enumerated subject of the acting government's powers. Second, the Court asks whether the challenged action violates any separately expressed constitutional limitation, such as a constitutional right expressly guaranteed in Part III of the Constitution. When the Court says that an act in violation of express constitutional rights is not within the acting government's enumerated powers, the Court implements this two-step process.[4]

When India's Supreme Court has sought to protect rights that are not expressly mentioned in the Indian Constitution, such as the right to privacy, the Court has protected those unmentioned rights by reading the Constitution's express rights very broadly.[5] Interpretations that push the boundaries of linguistic plausibility pose potential long-term risk to the Court's stature. The Court could reach the same outcomes in another way that does not require the large linguistic leap involved in reading express rights broadly. Within the traditional two-step of constitutional rights adjudication, deciding the law of constitutional characterization lets courts protect unwritten rights at step 1, before even turning to what the Constitution expressly says about rights. The Constitution's enumeration of powers does not define what relation governing actions must have to enumerated powers in order to be within those powers. Courts must create a law of constitutional characterization to decide that

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4 *Kavalappara Kottarathil and Kochunni v States of Madras and Kerala* AIR 1960 SC 1080 [24]: "It is, therefore, manifest that the law must satisfy two tests before it can be a valid law, namely, (1) that the appropriate Legislature has competency to make the law; and (2) that it does not take away or abridge any of the fundamental rights enumerated in Part III of the Constitution." *See also*, eg, *Basheshar Nath v CIT* AIR 1959 SC 149 [61]; *PUCL v Union of India* (2003) 4 SCC 399 [36]: AIR 2003 SC 2363 [37].

5 On privacy, *see*, *KS Puttaswamy v Union of India* (2017) 10 SCC 1; *KS Puttaswamy v Union of India* (2019) 1 SCC 1. On other broad readings of fundamental rights, *see*, eg, *PUCL v Union of India* (2003) 4 SCC 399 [42]-[43]: AIR 2003 SC 2363 [44]-[45]; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [93]-[102], [141], [143], [240], [242]: AIR 2018 SC 4321 [82]-[90], [129], [131], [225], [227].

question. Doing so is clearly required by the fact of power enumeration. In fulfilling its textually unambiguous duty to declare the law of the Constitution,[6] the Court must create a law of constitutional characterization. And through that law of constitutional characterization, the Court can protect both federalism and individual rights.

When the American founders pioneered judicially enforced power enumeration as a constitutional strategy, they conceived of it as protecting rights in one step, not two. Just enumerating powers by subject was expected to protect rights through the law of constitutional characterization that courts would have to create to implement the enumeration. Courts would have to decide what features of governing actions were necessary or sufficient to bring those actions within enumerated subjects of power, and in doing so, courts could hold that governing actions were not within powers if those actions flouted values that the courts judged integral to the constitutional scheme. Those values could be about the distribution of power among governments – the values of federalism – or about the relationship of government to the individual.

When opponents of the draft United States Constitution complained that an express bill of rights was needed, key proponents, most notably James Wilson, argued that enumerating powers sufficiently protected rights, and did so more comprehensively than any finite list of express rights could hope to do. Through the law of constitutional characterization, courts would hold that governing actions were just not "with respect to" enumerated subjects of power if those actions violated values underlying the constitutional scheme. When the first Congress to assemble under the new Constitution initiated amendments to add an express bill of rights, it acknowledged the force of arguments for a one-step process by including the ninth amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[7] The desire of many founders to be very clear that particular rights were protected was not to be construed to derogate from the extent to which rights were protected anyway through the constitutional enumeration of powers.

India's Constitution limits its governments to governing "with respect to" specified subjects,[8] yet does not elaborate on what is sufficient or necessary to make a governing action "with respect to" a subject of power. India's Supreme Court has a clear constitutional mandate to decide that question.[9] In fulfilling that mandate, the Court can introduce to its analysis whatever considerations it judges relevant to achieving the right balance of power, both between

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6 The Constitution of India 1950, art 141: "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

7 The Constitution of the United States 1789, amendment 9.

8 The Constitution of India 1950, art 246 and schedule VII.

9 The Constitution of India 1950, art 141.

governments and between government and the individual. Like other constitutional courts charged with umpiring distributions of power, the Indian Supreme Court has in its rulings clearly and repeatedly considered the balance of power between the nation and the states, though not with extensive elaboration. The Court could more explicitly have regard to India's reasons for federalism when deciding what power is distributed to each government. The Court could also introduce reasoning about rights into its law of constitutional characterization, and hold that governing actions are not "with respect to" enumerated subjects of power if they take too much freedom from people or discriminate among people unjustly, any more than if those actions marginalize other governments. Laws are not "with respect to" powers if they violate human rights, any more than if they violate the space for other regulators' powers.

This article first considers the indispensable role of a law of constitutional characterization in implementing India's constitutional scheme. The article then turns to comparative constitutional experience to illuminate ways in which India's Supreme Court could expand India's law of constitutional characterization, ways that directly protect rights and that complement the Court's existing constitutional rights jurisprudence.

At the American Founding, James Wilson argued that an extensive, express bill of rights was not needed precisely because constitutionally enumerated subjects of power could be read down so as not to intrude upon cherished rights. Wilson's reasoning can complement rights adjudication under constitutions, such as India's, that expressly protect rights but do not do so exhaustively. Where a constitution is selective in its express protections for rights, but comprehensive in its express provision for powers, deciding the reach of the constitution's comprehensive provision for powers lets courts more comprehensively protect rights too.

II. THE LAW OF "WITH RESPECT TO"

Enumerating powers by subject is a familiar feature of federal constitutionalism the world over. The American pioneers of this device aspired to achieve through it a vertical distribution of power that would satisfy the reasons they had for wanting a federal system.[10] The choice to enumerate presupposed that specifying subjects of power could concretely guide decisions about the actual distribution of power. In this, the authors of power enumeration were mistaken. Deciding the actual distribution of power in systems that enumerate power by subject requires constitutional dispute resolvers to create a law of constitutional characterization. In creating that law, courts are little more constrained by power enumeration than they would be by abstract expressions of distributive

[10] *See*, Laurence Claus, 'Enumeration and the Silences of Constitutional Federalism' (2018) 16 International Journal of Constitutional Law 904, 914.

principles, such as subsidiarity. The indeterminacy of subject enumeration calls for those who must decide the actual distribution of power to decide what powers should flow from the first principles of the constitutional scheme.

A. The Open Space in Enumeration

Laws, and other governing actions, do not have single subjects. Laws, and other governing actions, can be characterized in more than one way. That fact stops enumeration of subjects from determinately distinguishing the powers of one government from the powers of another. Any governing action can credibly be characterized as *about*[11] – in Indian constitutional parlance, as "with respect to"[12] – all manner of subjects, depending on what *relations* between action and subject of power are deemed sufficient or necessary to bring action within power. The Indian Constitution's text, like its federal antecedents in the United States, Canada, and Australia, does not settle what relations between governing actions and constitutional powers are sufficient or necessary to bring actions within powers. "With respect to" is not self-defining. "With respect to" can be narrowed by identifying necessary purposes or widened by embracing sufficient effects. As everything affects everything, there is no intrinsic limit on what action may be "with respect to" a given subject, as the United States Supreme Court's commerce power jurisprudence has at times exemplified.[13]

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[11] *See*, Stephen Yablo, *Aboutness* (Princeton University Press 2014); John R Searle, *Intentionality: An Essay in the Philosophy of Mind* (CUP 1983); Hilary Putnam, 'Formalization of the Concept "About" (1958) 25(2) Philosophy of Science 125.

[12] The Constitution of India 1950, art 246.

[13] *See*, eg, *Wickard v Filburn* 1942 SCC OnLine US SC 133 : 87 L Ed 122 : 317 US 111, 125, 128-29 (1942) (Jackson, J, opinion of the Court) ("even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce …Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."); *United States v Lopez* 1995 SCC OnLine US SC 42 : 514 US 549, 617 (1995) (Breyer J, joined by Stevens, Souter, and Ginsburg, JJ, dissenting) ("the specific question before us, as the Court recognizes, is not whether the 'regulated activity sufficiently affected interstate commerce,' but, rather, whether Congress could have had 'a rational basis' for so concluding."); *Gonzales v Raich* 2005 SCC OnLine US SC 44 : 545 US 1, 17 (2005) (Stevens, J, majority opinion of the Court) ("[o]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."). The United States Supreme Court's use of effects tests is often attributed to the United States Constitution's provision for Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." The Constitution of the United States Art. I §8 cl. 18. *See*, eg, G*onzales* v *Raich* (Scalia, J, concurring), at 34: "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." In discussing a Congressional bill to incorporate a mining company in 1800, then-Vice President Thomas Jefferson observed: "Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built'? Under such a process of filiation of necessities the

When disputes about the reach of government power arise, those charged by a written constitution with resolving those disputes must decide what relations governing actions may or must have to enumerated powers to fit within those powers. As the Indian Constitution does not itself elaborate the reach of "with respect to", the Constitution delegates to the courts the task of creating India's law of constitutional characterization.

The multi-list format of the Indian Constitution's power enumeration displays on its face the truth that laws do not have single subjects. Without even waiting for concrete demarcation disputes, anyone perusing the lists of purportedly exclusive national and state subjects can see that many governing actions are going to look like they belong inside each list. When the Privy Council encountered concrete disputes about actions that looked at home inside the "exclusive" powers of more than one government, their Lordships' solution, first for Canada and then for India, was to ask what was the challenged law's *true* subject – its "pith and substance."[14] That doctrine seemed to presuppose that laws have, or usually have, singular true essences, true natures, that can be discerned if one looks hard enough. But that presupposition is false.[15] Dispute resolvers must *decide* what purposes, what effects, what formal

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sweeping clause makes clean work." — Letter from Thomas Jefferson to Edward Livingston (30 April 1800). We will never know whether the centralizing impetus of the United States Congress and Supreme Court would have been any less and whether effects tests would have been eschewed in the absence of the necessary and proper clause. As both the ratifying debates and the arguments of counsel in *M'Culloch v State of Maryland* 4 L Ed 579 : 17 US 316 (1819) made clear, the clause did not have to be read to enlarge power and could even be read to limit power. *See*, eg, Gary Lawson and Patricia B Granger, 'The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause' (1993) 43 Duke Law Journal 267. At the Virginia Ratifying Convention, James Madison argued that the necessary and proper clause "gives no supplementary power. It only enables them to execute the delegated powers. If the delegation of their powers be safe, no possible inconvenience can arise from this clause. It is at most but explanatory. For when any power is given, its delegation necessarily involves authority to make laws to execute it." — Documentary History (n 1), vol 10 1323. Edmund Randolph, who had declined to sign the Constitution at Philadelphia partly because of the clause [Max Farrand (ed), *The Records of the Federal Convention of 1787* vol 2 (Yale University Press 1911) ('Records') 563-64, 631 (Madison's notes)], defended it at the Virginia Convention, but conceded "that the clause is ambiguous, and that that ambiguity may injure the States." — Documentary History (n 1), vol 10 1323.

[14] *See*, *Union Colliery Company of British Columbia Ltd v Bryden* (1899) AC 580, 587; *Prafulla Kumar Mukherjee v Bank of Commerce Ltd* 1947 SCC OnLine PC 6 : AIR 1947 PC 60 [37]: (1946-47) 74 IA 23, 43: "Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with."

[15] "The phrase is still used in Canada today, though the underlying essentialist idea that a complex piece of legislation has a single 'true nature and character' does not withstand close scrutiny, and the phrase 'pith and substance' has come to conceal an increasingly diverse range of criteria." — Tony Blackshield, 'Working the Metaphor: The Contrasting Use of "Pith and Substance" in Indian and Australian Law' (2008) 50 Journal of Indian Law Institute 518, 519.

features are sufficient or necessary to make laws constitutionally "with respect to" subjects of power.

Informed by Canadian experience, the Indian Constitution does expressly declare what is to happen when a governing action actually fits inside the exclusive powers of more than one government. Its deployments of "subject to" and "notwithstanding" ostensibly deny state governments any power to take actions "with respect to" exclusive state subjects if those actions are also "with respect to" exclusive national subjects.[16] If the words describing national subjects were read broadly (the interpretation question) or if what makes governing actions "with respect to" national subjects were conceived broadly (the characterization question), then exclusive national power would leave little space for state power to operate at all. In response to this, the Indian Supreme Court starts with a presumption that the challenged governing action, whether state or national, is constitutional.[17] Where a challenged law looks like it belongs inside both the lawmaker's exclusive power and another government's exclusive power, the courts have striven to characterize the challenged governing action as not "with respect to" the other government's exclusive power, either by interpreting the words describing the other government's exclusive power narrowly, or by holding that the challenged law has a true home with the lawmaking government, and only a drive-by, "incidental" relationship with the other government.[18] Applying a presumption of constitutionality to each

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[16] The Constitution of India 1950, art 246: "1. Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List'). 2. Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the 'Concurrent List'). 3. Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List'). 4. Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

[17] *See*, eg, *PN Krishna Lal v Govt of Kerala* 1995 Supp (2) SCC 187 [8], [9]; *Tripura Goods Transport Assn v Commr of Taxes* (1999) 2 SCC 253 [13] (quoting *PN Krishna*); *Welfare Assn v Ranjit P Gohil* (2003) 9 SCC 358 [25], [26]; *Offshore Holdings (P) Ltd v Bangalore Development Authority* (2011) 3 SCC 139 [70].

[18] *See*, eg, *Hoechst Pharmaceuticals Ltd v State of Bihar* (1983) 4 SCC 45 [41]: (1983) 3 SCR 130 [39]: "But the principle of Federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an 'irreconcilable' conflict between the Entries in the Union and State Lists. In the case of a seeming conflict between the Entries in the two lists, the Entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two Entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non-obstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two lists will arise if the impugned legislation, by the application of the doctrine of 'pith and substance'

government's laws through an impressionistic "pith and substance" enquiry has the potential to let national power fluctuate on a "depends who's asking" basis – national power may wax and wane like a concertina, narrowing to make space for the states when the national government is inactive, but expanding to authorize national action when the national government wants to act.[19]

If characterizing governing actions as inside or outside enumerated powers were truly just an exercise in discovering the true essences of the challenged actions, then there would be no presumption of constitutionality that puts a thumb on the scale for the government under challenge. The rhetoric of pith and substance seems to be covering for a salvaging strategy, but to what end? Both the Indian Supreme Court and its British predecessor have often enough signaled what that end is. Last year, in *Pandurang Ganpati Chaugule* v. *Vishwasrao Patil Murgud Sahakari Bank Ltd*,[20] the Court quoted an earlier 11-judge bench, which observed:

> *A legislative entry being expressed in a broad designation indicating the contour of plenary power must receive a meaning conducive to the widest amplitude, subject however to limitations inherent in the federal scheme which distributes legislative power between the Union and the constituent units. The field of "banking" cannot be extended to include trading activities which not being incidental to banking*

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appears to fall exclusively under one list, and the encroachment upon another list is only incidental." This reasoning has a long pedigree. *See*, *Governor-General in Council v Province of Madras* AIR 1945 FC 9 : (1945) FCR 179 [191]-[92]: PC, (Lord Simonds): "Their Lordships do not doubt that the effect of these words is that, if the legislative powers of the Federal and Provincial legislatures, which are enumerated in List I and List II of the seventh schedule, cannot fairly be reconciled, the latter must give way to the former. But it appears to them that it is right first to consider whether a fair reconciliation cannot be effected by giving the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving the language of the Provincial Legislative List a meaning which it can properly bear.… The Indian constitution is unlike any that have been called to their Lordships' notice in that it contains what purports to be an exhaustive enumeration and division of legislative powers between the Federal and Provincial legislatures. Where there is such an enumeration, the language of the one list may be coloured or qualified by that of the other." Each decision's reference to giving the words defining national power less scope than they might in another context bear may have just meant that the words as used in settings other than the Indian Constitution might mean more. Alternatively, that reference may have overtly acknowledged that the scope of national power under the Indian Constitution might vary depending on whether state action or national action is at issue.

[19] *Compare*, *ALSPPL Subrahmanyan Chettiar v Muttuswami Goundan* 1940 SCC OnLine FC 9, 217-218, 231: AIR 1941 FC 47 (Sulaiman, J, dissenting) [33], [56] (contending for the distinct but related position that scope for state encroachment on national subjects depends on whether the national government is active).

[20] (2020) 9 SCC 215 : 2020 SCC OnLine SC 431.

> *encroach upon the substance of the entry "trade and commerce" in List II.*[21]

Later the Court quoted another of its past decisions, in which it had observed: "[k]eeping in view that we are construing a federal Constitution, distribution of legislative powers between the Centre and the State is of great significance."[22] In another recent decision, the Court quoted an earlier opinion that "the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States."[23] And in another, the Court emphasized that "[i]t is the essence of a Federal Constitution that there should be a distribution of legislative powers between the Centre and the Provinces."[24] In yet another, the Court declared:

> [b]lind adherence to strict interpretation which would lead to invalidation of statutes as being legislated in the forbidden sphere should be avoided, lest all beneficial legislations would be stifled at birth and many a subject entrusted to the State legislature rendered ineffectual[,] divesting the State legislature of its power to deal with particular subject of entry or topic.[25]

In deciding what the enumerated subjects of national and state power let national and state governments respectively do, the Indian Supreme Court recognizes that it is deciding the character of Indian federalism. Creating the law of constitutional characterization is a truly creative endeavour, not merely an enquiry into pre-existing essences or a linguistic logic game. Behind the rhetoric of pith and substance, the Indian Supreme Court seeks to get the federal balance right. The indeterminacy of "with respect to" hands to the Court that solemn task. In fulfilling it, the Court has a constitutional power and duty to decide the right scope of government power. Through its law of "with respect to", the Court strives to strike the right balance between the nation and the states.

India's experience with striking a federal balance through the rhetoric of pith and substance mirrors Canada's. In *Labatt Breweries of Canada Ltd v. Attorney General of Canada*,[26] Canada's Supreme Court purported to ask about

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[21] *Pandurang* (n 20) [36], quoting *Rustom Cavasjee Cooper v Union of India* (1970) 1 SCC 248, 281 [36] (emphasis supplied in *Pandurang*).

[22] *Pandurang* (n 20)[99], quoting *Girnar Traders v. State of Maharashtra* (2011) 3 SCC 1 [173].

[23] *Jayant Verma v Union of India* (2018) 4 SCC 743 [42], quoting Ruma Pal, J, in *ITC Ltd v Agricultural Produce Market Committee* (2002) 9 SCC 232 [93].

[24] *Offshore Holdings (P) Ltd v Bangalore Development Authority* (2011) 3 SCC 139 [73].

[25] *P N Krishna Lal v Govt of Kerala* 1995 Supp (2) SCC 187 [9].

[26] 1979 SCC OnLine Can SC 135 : (1980) 1 SCR 914.

the challenged law's pith and substance,[27] but also explicitly acknowledged that achieving a federal balance of power underlay its conclusion that beer labelling could not be regulated under the national trade and commerce power.[28] Was regulating beer labelling truly not in pith and substance about regulating trade and commerce? Was it in pith and substance within only some exclusive provincial power, such as regulating local works and undertakings?[29] The beer labels were not made for the brewer's private edification; they were messages to potential buyers designed to promote *sales*. Conceptual analysis did not really drive the Court's conclusion – federal balance did. The Canadian Supreme Court cited earlier case law that "'minute rules for regulating particular trades' are not within the trade and commerce competence",[30] and observed that "[w]ithout judicial restraint in the interpretation of this provision, the provincial areas of jurisdiction would be seriously truncated."[31] Some regulations of trade were not within the national power to regulate trade – not because they were conceptually not within trade, but because there was another regulator in the room whom the Court judged to have a better claim to doing that regulating.

Conclusions that laws are, in pith and substance, within one government's powers, and only incidentally or peripherally related to the other government's powers, may in many circumstances be covering for unwritten reasoning about what the federal balance should be. That real reasoning may in fact be about why we would want to have a federal system. Fixating courts' *written* reasoning on purported centrality or peripherality to subjects may obscure this. In *Labatt*, the Canadian Court came out and conceded that its reasoning was federal-distributional in character. The Indian Supreme Court has on occasion come close to doing so too.[32] Enumeration requires courts to make sense of situations where governing actions are equally about, just as central to, more than one subject. In making the law that makes sense of this, the law of

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[27] Ibid 942-43, majority opinion of Estey, J, joined by Martland, Dickson, and Beetz, JJ: "With respect to legislation relating to the support, control or regulation of the various levels or components in the marketing cycle of natural products, the provincial authority is *prima facie* qualified to legislate with reference to production …and the federal Parliament with reference to marketing in the international and interprovincial levels of trade. In between, the success or failure of the legislator depends upon whether the pith and substance or primary objective of the statute or regulation is related to the heads of power of the legislative authority in question. Incidental effect on the other legislative sphere will no longer necessarily doom the statute to failure."

[28] The Constitution Act 1867, § 91(2) (UK).

[29] The Constitution Act 1867, § 92(10). *See also*, § 92(16).

[30] 1979 SCC OnLine Can SC 135 : (1980) 1 SCR 914, 935.

[31] Ibid.

[32] *See*, eg, *ITC Ltd v Agricultural Produce Market Committee* (2002) 9 SCC 232 (reading down the word "industries" as it appears in an exclusive national power (Schedule VII, List I, entry 52) to exclude markets and fairs) [59] (YK Sabharwal, J): "The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of State Legislature and preserves the federalism while also upholding the central supremacy as contemplated by some of its articles."

constitutional characterization, courts are empowered to decide what power each government of enumerated powers *should* have. That lets courts take account of distributional considerations, as they repeatedly have, whether explicitly or *sub silentio*. And it lets them take account of human rights too.

Behind the indeterminate linguistic veneer of subject enumeration, what criteria should guide India's Supreme Court in finding a federal balance? To answer that question, we need to ask another: why is India federal? What good is federalism supposed to achieve? The answer to that question supplies true pith and substance for deciding the distribution of power. And once we recognize the breadth of discretion that the Court has in creating the law of constitutional characterization to achieve a balance between governments, we can see that this judge-made law can be evolved to help strike the right balance between government and the individual too.

B. Why Federalism?

In *The Spirit of the Laws*, Montesquieu argued that federalism was crucial to preserving truly republican government:

> If a republic is small, it is destroyed by a foreign force; if it is large, it is mined by an internal imperfection. The evil is in the very thing itself; and no form can redress it. Very probable it is therefore that mankind would have been obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic.[33]

To be truly republican, government had to be local. A *république federative* enabled small self-governing communities to survive by joining together for common defense without surrendering control of their internal governance.

Local governance may let more people live under rules and policies they actually favour. Larry Kramer claims in the American context that "the best argument for federalism is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decision making."[34] Locally chosen leaders may prove more responsive to local needs.[35] Local control may help reconcile

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[33] Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Nugent tr 1873) (1st edn 1748), bk 9 ch 1, 145.

[34] Larry Kramer, 'Understanding Federalism' (1994) 47 Vanderbilt Law Review 1485, 1511.

[35] *See*, eg, Zaid Al-Ali, 'Egypt's third constitution in three years: A critical analysis' (International IDEA, 2013) ("There has been for some time a global trend toward

diverse subcultures to staying together in one nation.[36] And when it comes to law reform, local communities who are ready to try something new can move ahead of their neighbours and let everyone see what happens when things change. Lord Bryce observed that American federalism let local legislators "try experiments with less risk than countries like France or England would have to run, for the bodies on which the experiments are tried are so relatively small and exceptionally vigorous that failures need not inflict permanent injury."[37] Justice Louis Brandeis memorably echoed Bryce: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[38]

What does all this suggest for the distribution of power between the nation and its regions? It suggests that what can be well governed locally should be governed locally. That principle was expressed right at the opening of the Philadelphia Convention, in the Virginia Plan that set the terms of the American founders' deliberations. Congress's power to legislate for the nation should, the plan provided, reach "all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."[39] As the nations of Europe formed a closer union, that principle of subsidiarity was acknowledged in the terms on which they did so.[40] Although the residuary legislative power vested in India's national government seems to make national governance the constitutional default rule,[41] that residuary power does not invert the principle that governing should stay as close to the governed as it can competently be. India's constitutional choice to invest exclusive power in state governments to regulate sixty-six subjects, including public order, public health, agriculture, fisheries, intrastate trade and commerce, and production,[42] while the nation holds

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decentralization for a very obvious reason: it brings policy formation and democracy closer to the people. ... [C]entralization has clearly been a major contributor to Egypt's current predicament: local officials are appointed by Cairo and are therefore not accountable to the people who live in the provinces...).

36 Guido Calabresi and Eric S Fish, 'Federalism and Moral Disagreement' (2016) 101 Minnesota Law Review 1, 26-27 ("One can advocate federalism as a political value in itself, to be weighed against others, and not merely reducible to the policies one invokes federalism to serve. … [O]ne could argue that federalism is valuable precisely because it allows people with profoundly different moral views to stay peacefully united in one country").

37 James Bryce, *The American Commonwealth* (Macmillan 1888) 1219.

38 *New State Ice Co v Liebmann* 1932 SCC OnLine US SC 63 : 76 L Ed 747 : 285 US 262, 311 (1932) (Brandeis, J, dissenting).

39 Records (n 13), vol 1 21 (Madison's notes).

40 Treaty on European Union 1992, art 5(3) ("Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.").

41 The Constitution of India 1950, art 248(1). *See also*, Seventh Schedule, List I, entry 97.

42 The Constitution of India 1950, Seventh Schedule, List II, entries 1, 6, 14, 21, 26, and 27.

exclusive power over defense, foreign affairs, interstate and foreign trade and commerce, and currency, among other things,[43] suggests that something resembling a subsidiarity principle was at work. Dr B.R. Ambedkar explained to the Constituent Assembly in the following terms its drafting committee's choice to enumerate national powers notwithstanding the express provision for residual power to belong to the nation:

> Theoretically I quite accept the proposition that when anything which is not included in List II or List III is by a specific article of the Constitution handed over to the Centre, it is unnecessary to enumerate these categories which we have specified in List I. The reason why this is done is this. Many States people, and particularly the Indian States at the beginning of the labours of the Constituent Assembly, were very particular to know what are the legislative powers of the Centre. They wanted to know categorically and particularly; they were not going to be satisfied by saying that the Centre will have only residuary powers. Just to allay the fears of the Provinces and the fears of the Indian States, we had to particularise what is included in the symbolic phrase "residuary powers". …[W]e have only followed as I said, the requirements of the various Provinces to know specifically what these residuary powers are, and also we have followed well-known conventions which have been followed in any other federal constitutions.[44]

The choice to enumerate national powers signaled that India's residuary powers clause was not meant to extend national power much beyond the nation's enumerated powers. In effect, the clause acknowledged the indeterminacy of enumerated power. When a constitutional court has to decide what the vertical distribution of power should actually be, subsidiarity supplies an intelligible principle that lets the court overtly and coherently resolve disputes by the light of reasons that informed the nation's choice to be federal.[45]

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[43] The Constitution of India 1950, Seventh Schedule, List I, entries 1, 10, 42, 41, and 36.

[44] CA Deb 1 September 1949, vol IX, 9.129 246-47.

[45] A substantial body of scholarship contends that subsidiarity should inform decisions about vertical distribution of power under the United States Constitution. *See*, eg, Steven G Calabresi and Lucy D Bickford, 'Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law' in James E Fleming and Jacob T Levy (eds), *Nomos XV: Federalism and Subsidiarity* (HUP 2014) 123; Vicki C Jackson, 'Subsidiarity, the Judicial Role, and the Warren Court's Contribution to the Revival of State Government' in Fleming and Levy (eds) (n 45) 190, 196-99; Robert D Cooter and Neil S Siegel, 'Collective Action Federalism: A General Theory of Article I' (2010) 63 Stanford Law Review 115; Stephen Gardbaum, 'Rethinking Constitutional Federalism' (1996) 74 Texas Law Review 795, 836; Donald H Regan, 'How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v Lopez*' (1995) 94 Michigan Law Review 554, 555.

How a principle of subsidiarity might contribute to deciding the distribution of power in India is a question for homegrown judgment, guided by the Indian judiciary's deep understanding of the social forces that made and keep India federal. As Justices of the Indian Supreme Court have emphasized, the states "are neither satellites nor agents of the center", and "[d]ecentralisation of power is not only [a] valuable administrative device to ensure closer scrutiny, accountability and efficiency, but is also an essential part of democracy."[46] Identifying the reasons for India's choice to distribute power vertically can guide decisions about which governing actions should be national and which should be local.[47] Directly addressing the "why are we federal?" question when ruling on the constitutionality of governing actions could deepen the precedential value of those rulings by shedding more light on what will guide decisions in future cases. Subject enumerations cannot fulfil their purported function of concretizing and rendering determinate the vertical distribution of power. Invoking them as though they do diverts attention from the considerations that actually make federalism relevant to good governance. As subject enumerations do not settle the distribution of power, courts could say more about the principles that should.

III. AN IMPLIED BILL OF RIGHTS

Legal scholarship has long had much to say about how distributing power can protect rights, but most of that commentary has focused on horizontal distribution, deploying the rubric of "separation of powers". Securing "political liberty" was the key accomplishment that Montesquieu attributed to the tripartite power structure that he identified in "the Constitution of England".[48] Distributing powers among participants in a government can help prevent any one among them from conclusively determining the reach of their own powers. Checks and balances among office holders and institutions inside a government can help safeguard people from the abuse of power. But distributing power vertically between governments can help protect rights too.

Federalism can help protect human rights in at least three ways. First, federalism may produce more reliably countervailing power centers[49] than are the

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[46] *SR Bommai v Union of India* (1994) 3 SCC 1 : AIR (1994) SC 1918 [66], [68].

[47] *See*, HM Seervai, *Constitutional Law of India* (Universal Law Publishing 1967) ch 5.81 ("[t]he broad line of division between Lists I and II is that matters of national interest and importance are given to the national Government and matters of predominantly State interest are given to the States, a provision being made in the concurrent list that in respect of certain matters, which are matters of common concern to the States and the Union, experiments by the States are permitted with power to Parliament to legislate on an all-India basis should it become necessary to do so"); Granville Austin, *The Indian Constitution* (OUP India 1966) ch 8 (on what the founders hoped to achieve through the distribution of power).

[48] *See*, Montesquieu (n 33) bk 11 chs. 5 and 6, 173-74; Laurence Claus, 'Montesquieu's Mistakes and the True Meaning of Separation' (2005) 25 Oxford Journal of Legal Studies 419.

[49] *Compare*, Jessica Bulman-Pozen and Heather K Gerken, 'Uncooperative Federalism' (2009) 118 Yale Law Journal 1256; Jessica Bulman-Pozen, 'Federalism as a Safeguard of the

supposedly separated institutions of any particular government. Chief executives may more readily subvert or dominate others within their government than they can subvert or dominate other whole governments. Depending on the distinctive course of a nation's history, federalism may supply its most reliable safeguards against concentrated power. Second, vertical distribution through enumeration can turn a federation's constitutional court into an indispensable umpire that all can see must be obeyed if the system is to survive.[50] Federalism may secure deference to courts, a deference that can then be relied upon by those courts when issuing rulings that protect individual rights too. Federalism can also create further need and opportunity for constitutional courts to intervene to protect individual rights, in so far as it creates risks that regional majorities may oppress regional minorities even as it more securely situates courts to rule instances of oppression out of bounds. Third, subject enumeration cannot be implemented without courts creating the law of constitutional characterization. A power-enumerating written constitution affords courts discretion in making the law of constitutional characterization to decide what considerations are relevant to finding actions inside or outside powers. Courts fulfilling their written constitutional mandate can rule governing actions out of bounds, not "with respect to" the subjects of that government's powers, because those actions take too much from others. The law of "with respect to" can rule out mistreating people as surely as it can rule out displacing other governments. Courts can imbue characterization with reasoning about rights.

A. The Constitution of Illustrations and the Constitution of Definitions

At the dawn of America's pioneering experiment with written constitutionalism, a fundamental conceptual question remained unsettled – did the constitutional document *illustrate* the ultimate law of the Constitution, or did the constitutional document *define* the ultimate law of the Constitution? Under an *illustrative* conception of written constitutionalism, the written constitution functions as law the way common law case reports do, by reflecting or illustrating background principles that actually are the law and that legal texts exemplify but do not necessarily define in full. Under a *definitive* conception of written constitutionalism, the written constitution functions as law the way statutes are usually held to do, expressing the full extent of their law within their four corners. The contrast between these competing conceptions attracted

Separation of Powers' (2012) 112 Columbia Law Review 459; Jessica Bulman-Pozen, 'Partisan Federalism' (2014) 127 Harvard Law Review 1077 (on various ways that power dynamics between the American national and state governments may help protect against undue concentrations of power, depending in part on how party politics interacts with these institutional structures). *See also*, Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (University of Chicago Press 2009) (on how interactions among institutions and laws in a federal system may enhance protections for rights).

[50] *See*, (n 2).

debate within the founding generation, long before debates about whether the meaning of the written Constitution's words (whether deployed illustratively or definitively) should be fixed by discoverable original understanding. Right in the founding era, Justices of the new Supreme Court diverged on whether the new Constitution contributed to law by reflection or by definition. In *Calder v. Bull*, Justice Samuel Chase declared:

> An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.[51]

That illustrative vision of written constitutionalism prompted Justice James Iredell to respond with a definitive vision:

> If, then, a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of Parliament, which should authorise a man to try his own cause, explicitly adds, that even in that case, 'there is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no

[51] *Calder v Bull* 1 L Ed 648 : 3 US 386, 388-89 (1798).

> doubt whether it was the intent of the Legislature, or no.' — 1 Bl. Com. 91.
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> In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.... There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2nd. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.[52]

Are written constitutions like case reports, reflecting a higher truth of legal principle, or are they like statutes, defining law because they source it? Illustrative and definitive conceptions of written constitutions may draw on diverging conceptions of what morally supports the role of courts in resolving constitutional disputes. An illustrative conception may come from seeing constitutional adjudication as about implementing the deep morality of the culture, which the courts must seek in iconic and learned writings, past and present. A definitive conception may come from seeing the written Constitution as embodying the will of the people, as much in what it allows as in what it disallows, and seeing that pedigree in popular support as a morally overriding consideration. As the clash between Chase and Iredell displayed, there is a persistent potential for tension between these two visions.

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[52] Ibid. 398-99.

Although instances and methods of constitutional adoption and amendment vary in the credibility with which they can claim to implement the will of the people, most contemporary governments perceive a need to claim popular support for their governing. Very few legacy claims to divine right or invocations of mere tradition survive – almost everywhere that governments express a moral basis for their power, they feel a need to attribute it to popular will.[53] The opening words of India's Constitution, like those of the American prototype, attribute authorship of all that follows to "the People".[54] The claim of popular support gives the written Constitution its political resonance. Iredell's reasoning reflected the zeitgeist of the American Revolution, and his call to a definitive vision of constitutional adjudication proved persuasive to later generations of American jurists. But how much did that vision truly constrain courts in adjudicating the reach of government power?

During the nineteenth century, American courts converged on a particular textual vehicle for implementing their vision of right and justice. Invoking the due process clauses of the fifth and fourteenth amendments,[55] along with state constitutional counterparts, became the accepted way for courts to keep within a definitive conception of constitutional text yet limit government intrusions on freedoms that were not specifically protected in that text.[56] During the twentieth century, that reliance on due process persisted and expanded, but its use to adjudicate deeply contentious questions of social and economic policy[57] drew intense criticism. Critics charged that the words of the due process clauses were being applied in ways that their history and linguistic structure could not support.[58]

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[53] *See*, eg, Laurence Claus, *Law's Evolution and Human Understanding* (OUP 2012) Ch 8.

[54] The Constitution of India 1950, Preamble: "We, the People of India…"; The Constitution of the United States 1789, Preamble: "We the People of the United States".

[55] The Constitution of the United States 1789, amendment V: "No person shall be deprived of life, liberty, or property, without due process of law."; The Constitution of the United States 1789, amendment XIV § 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

[56] *Compare*, eg, *Wynehamer v The People* (1856) 13 NY 378 and Thomas M Cooley, *Constitutional Limitations* (Little, Brown, and Co 1868) ch 11 with *Allgeyer v State of Louisiana* 1897 SCC OnLine US SC 61 : 41 L Ed 832 : 165 US 578 (1897) for the clause's evolution from protecting existing rights to property and to liberty in the narrow sense of freedom from imprisonment to protecting liberty in the broad sense of freedom of action. *See generally*, John Harrison, 'Substantive Due Process and the Constitutional Text' (1997) 83 Virginia Law Review 493; JAC Grant, 'The Natural Law Background of Substantive Due Process' (1931) 31 Columbia Law Review 56; Roscoe Pound, 'Liberty of Contract' (1909) 18 Yale Law Journal 454.

[57] *See*, eg, *Lochner v State of New York* 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905); *Roe v Wade* 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973).

[58] *See*, eg, John Hart Ely, *Democracy and Distrust* (HUP 1980) 18, 32; *Planned Parenthood of Southeastern Pennsylvania v Casey* 1992 SCC OnLine US SC 102 : 120 L Ed 2d 674 : 505 US 833, 846-47 (1992) (citing Brandeis, J, in *Whitney v California* 1927 SCC OnLine US SC 126 : 71 L Ed 1095 : 274 US 357, 373 (1927) (concurring opinion)): "Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, ...the Clause has been understood to contain

Right back at the American Founding, even before the due process clauses were added to the Constitution's text, James Wilson had argued that the Constitution's text protected cherished rights, not by naming them, but by naming powers. The express constitutional boundaries on powers of which Justice Iredell was soon to speak were not just the provisions that expressed limits on powers, but also the provisions that expressed the powers themselves. The constitutional enumeration of powers was, argued Wilson, itself a sufficient textual vehicle to protect rights. Speaking soon after the Philadelphia Convention finished drafting the future United States Constitution, Wilson found himself defending the drafters' failure to include an extensive bill of rights. He argued that none was needed, because the Convention had adopted a power-limiting strategy that would protect rights more fully than any finite list of express rights could hope to do. The Convention had limited government power not by extensively enumerating rights, but by exhaustively enumerating *powers*.

> [A]n imperfect enumeration of the powers of government reserves all implied power to the people; and, by that means the constitution becomes incomplete; but of the two it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous, nor important, as an omission in the enumeration of the rights of the people.[59]

Like other key participants in the debates over ratifying the Constitution,[60] Wilson recognized the crucial role that courts would play in making

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a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.' As Justice Brandeis (joined by Justice Holmes) observed, '[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.'" In *KS Puttaswamy v Union of India* (2017) 10 SCC 1 [290], Chandrachud, J observed: "The constitutional history surrounding the drafting of Article 21 contains an abundant reflection of a deliberate and studied decision of the Constituent Assembly to delete the expression 'due process of law' from the draft Constitution when the Constitution was adopted. In the Constituent Assembly, the Drafting Committee chaired by Dr BR Ambedkar had included the phrase but it came to be deleted after a careful evaluation of the vagaries of the decision making process in the US involving interpretation of the due process clause. Significantly, present to the mind of the framers of our Constitution was the invalidation of social welfare legislation in the US on the anvil of the due process clause on the ground that it violated the liberty of contract of men, women and children to offer themselves for work in a free market for labour. This model evidently did not appeal to those who opposed the incorporation of a similar phrase into the Indian Constitution."

[59] Documentary History (n 1), vol 2 388; *See also*, Documentary History (n 1), vol 2 470, 482, 496.

[60] Oliver Ellsworth, *Connecticut Convention* in Documentary History (n 1), vol 3 553; Samuel Adams, *Massachusetts Convention* in Documentary History (n 1), vol 6 1395; John Marshall, *Virginia Convention* in Documentary History (n 1), vol 10 1431, 1432; James Madison, 'The Federalist 39' New York Independent Journal in Documentary History (n 1), vol 15

constitutional limits on power meaningful. He insisted that "the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department." Congress might "transgress the bounds assigned to it", but when a transgressing act "comes to be discussed before the judges – when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void." Because the judges would be "independent and not obliged to look to every session for a continuance of their salaries, [they] will behave with intrepidity and refuse to the act the sanction of judicial authority."[61] He elaborated that "[i]f a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and *the particular powers of government being defined*, will declare such law to be null and void."[62]

How exactly did defining powers protect rights? Wilson signaled an answer when discussing the reach of Congress's power to regulate interstate and foreign commerce. He observed:

> If indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.[63]

As Wilson read it, the enumerated power to regulate interstate and foreign commerce would not authorize regulations that intruded on the freedom of the press. Those charged with resolving disputes about what Congress could do would hold that Congress's power to regulate commerce did not extend to regulating in ways that restricted freedom of the press. Only a more specific power to regulate literary publications would have created a risk to press freedom and a need for express constitutional protection of the press. The general power to regulate commerce would be read down by the courts to protect unwritten but cherished freedoms. In Indian terms, a law that did threaten press freedom would *ipso facto* be characterized as not "with respect to" regulating interstate and foreign commerce, regardless of what relations to regulating interstate and foreign commerce it might have. If the American people in their Constitution wished to let Congress intrude on cherished freedoms, they would need to authorize those intrusions very specifically – general subjects of power would not be enough to authorize such intrusions. Other leading

384-85; James Madison, 'The Federalist 44' New York Packet in ibid 473. *See also*, Alexander Hamilton, 'The Federalist 78' in Documentary History (n 1), vol 18 89-91.

61 Documentary History (n 1), vol 2 450-51.

62 Documentary History (n 1), vol 2 517 (emphasis added).

63 James Wilson, 'Speech in the State House Yard, Philadelphia' in Documentary History (n 1), vol 2 168.

supporters of the Constitution argued for it in terms compatible with Wilson's view.[64]

The first Congress to assemble under the new Constitution responded to requests from some state ratifying conventions by initiating amendments that became the American Bill of Rights. That choice did not discount Wilson's view that cherished rights could be protected anyway through the law of constitutional characterization. The ninth amendment accommodated that view: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[65] To the extent that the existing constitutional framework already protected rights, the choice to add amendments protecting some rights expressly was not to be construed to deny or diminish the ongoing reality of those pre-existing protections.

Reading down broad powers to protect rights is a familiar feature of administrative law in many common law jurisdictions. When a legislature confers a broad statutory discretion on executive officials, common law courts often read down the reach of that discretion to protect individual rights. Had the legislature wished to let officials intrude on important rights, the legislature could have made that clear by being more specific. As Lord Halsbury memorably observed:

> "discretion" means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion; according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.[66]

In their opinion in *Minister for Immigration and Ethnic Affairs* v. *Teoh*, Australian Chief Justice Anthony Mason and Justice William Deane observed

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[64] *See*, Lawson and Granger (n 13) 315-21. *See also*, Alexander Hamilton 'The Federalist 84' in Documentary History (n 1), vol 18 130, 131 ("the constitution is itself in every rational sense, and to every useful purpose, a bill of rights.").

[65] The Constitution of the United States 1789, amendment 9.

[66] *Sharp v Wakefield* (1891) AC 173, 179 (Lord Halsbury, LC). *Compare*, in the American context of expressly constitutionalized rights, Cass R Sunstein, 'Nondelegation Canons' (2000) 67 University of Chicago Law Review 315, 331. "[C]onstitutionally sensitive questions (for example, whether a statute would intrude on the right to travel, violate the right to free speech, or constitute a taking) will not be permitted to arise unless the constitutionally designated lawmaker has deliberately and expressly chosen to raise them. The only limitations on the principle are that the constitutional doubts must be serious and substantial, and that the statute must be fairly capable of an interpretation contrary to the agency's own. So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement."

that where a later-enacted statute is ambiguous, courts should "favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations," including obligations under international human rights conventions and even when those obligations have not been incorporated by Parliament into domestic law. "In this context", they continued, "there are strong reasons for rejecting a narrow conception of ambiguity."[67] Moreover, "[t]he provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law."[68] In its Human Rights Act of 1998, the British Parliament codified such an approach, precluding officials from exercising statutory discretion in ways incompatible with the incorporated provisions of the European Convention on Human Rights.[69]

During the post-World War Two "Red Scare", the Australian High Court went beyond reading down, and struck down a statutory discretion to declare persons to be communists.[70] The statute excluded declared persons from national government employment and from leadership in designated trade unions. The Court held the statute's conferral of discretion to be beyond the national government's enumerated powers, including the national defense power. One of the Justices observed:

> The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse. A power to make a proclamation carrying legal consequences with respect to a lighthouse is one thing: a power to make a similar proclamation with respect to anything which in the opinion of the Governor-General is a lighthouse is another thing.[71]

A constitutional court has both a power and a duty to insist on being shown what makes a governing action "with respect to" a constitutional power. Congruently, a constitutional court has both a power and a duty to define the criteria that must be met to show the "with respect to" relation.

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67 (1995) 183 CLR 273 [27]. *See also*, [26].
68 Ibid [28].
69 Human Rights Act 1998, §§ 3, 6 (UK).
70 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
71 Ibid 259 (Fullagar, J).

At the beginning of modern written constitutionalism, James Wilson recognized that courts could raise their common law vision of rights to the new constitutional plane. Reading down broad delegations of power to protect rights need not be just an administrative law principle – it can be a constitutional law principle too. Just as legislatures can be presumed not to authorize curtailing important freedoms or drawing unjust distinctions when they confer broad powers on officials, so We the People, when writing a Constitution, can be presumed not to authorize curtailing important freedoms or drawing unjust distinctions when we confer broad powers on legislatures. If the People in their Constitution had wanted to empower legislatures to intrude on important rights, the People could have been more specific about that. Justice John Toohey of the Australian High Court emphasized the analogy in a speech delivered soon after that Court's landmark decisions finding for the first time an implied freedom of speech under the Australian Constitution.[72]

In *Melbourne Corpn. v. Commonwealth*, Australian Chief Justice John Latham characterized a challenged national law as not "with respect to" the national government's enumerated powers because that law targeted state governments.[73] The Australian Constitution confers on the national parliament an enumerated power to make laws with respect to "banking, other than State banking".[74] The national parliament enacted a law that prohibited non-state-owned banks from doing business with state and local governments, unless those banks first obtained the permission of the national government. The Australian High Court concluded that the "State banking" exception in the enumerated national power referred only to state-owned banking, but nonetheless held that the national power to legislate with respect to banking did not authorize the statutory restriction on non-state-owned banks. In Latham's words: "the legislation is really legislation by the Commonwealth with respect to a State or State functions as such and not with respect to the subject in respect of which it is sought to bind the State."[75] Applying that reasoning to James Wilson's example, a national law restricting interstate commerce in newspapers might be characterized as not with respect to interstate commerce, but rather with respect to press freedom, over which no government has power. Through such reasoning, a constitutional court expounding enumerated powers could elaborate an implied bill of rights.

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[72] John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 Public Law Review 158, 170 — a public speech delivered soon after the Australian High Court's landmark implied freedom of speech decisions in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[73] (1947) 74 CLR 31.

[74] Commonwealth of Australia Constitution Act 1901, § 51 (xiii).

[75] (n 73) 61 (Latham, CJ). *See also*, Williams, J, (n 73) 99-100. Dixon, J saw the state immunity as a separate implied limitation, rather than as intrinsic to characterization, observing that if a law "operates directly upon a matter forming an actual part of a subject enumerated among the federal legislative powers, its validity could hardly be denied on the simple ground of irrelevance to a head of power." — (n 73) 79. *See*, Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 Federal Law Review 221, 234.

India's Constitution follows its enumeration of exclusive and concurrent national and state subjects of power with a residuary provision empowering the national parliament "to make any law with respect to any matter not enumerated in the Concurrent List or State List."[76] Drawing on Lord Halsbury's conception of how the common law reads down discretion to administer[77] and James Wilson's early vision of a comparable constitutional reading down of discretion to legislate, India's law of constitutional characterization need not hold the Indian Parliament's residuary power to be plenary. Dr. Ambedkar's account to the Constituent Assembly of the relation between enumerated national powers and the residuary powers clause supports a limited reading of the latter.[78] India's law of constitutional characterization could read down the Parliament's residuary discretion so that it, like every other constitutionally enumerated power, cannot be used to violate the nation's foundational commitments to liberty and equality.

B. Finding Privacy in Powers

The constitutional enumeration of powers requires constitutional dispute resolvers to create a whole body of law that nestles neatly inside the written Constitution's text – the law of constitutional characterization. As the Constitution of India says nothing about what this necessary body of constitutional law should contain, the Supreme Court of India has discretion to define its law of characterization in those ways that it judges best fit and justify the system of government that the Constitution establishes.[79] Enumeration supplies courts with a way to exercise the kind of discretion that an illustrative conception of written constitutionalism affords, but within a definitive conception, because the enumerating text inherently delegates so much adjudicative discretion. In creating the law of constitutional characterization, courts can imbue the express "with respect to" relation with those limitations that strike the right balance of power both between national and state governments (why and how are we federal?) and between government and the individual (how free and equal are we?).

By the time that India's founders gathered to draft its Constitution, the pioneering American conception of power enumeration as a direct way to protect human rights had faded from view. Broad readings of the express due process clauses had become the visible way that American courts found protection for unwritten rights in the written Constitution. When the drafters of India's

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[76] The Constitution of India 1950, art 248(1). *See also*, Seventh Schedule, List I, entry 97.

[77] *Sharp v Wakefield* (1891) AC 173, 179 (Lord Halsbury, LC).

[78] CA Deb 1 September 1949, vol IX, 9.129 246-47. Taking such a limited view would require revisiting the reasoning in *Union of India v Harbhajan Singh Dhillon* (1971) 2 SCC 779 : AIR 1972 SC 1061 [59] that "if a Central Act is challenged as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List II."

[79] *See generally*, Ronald Dworkin, *Law's Empire* (HUP 1986).

Constitution chose not to include the language of due process, they nonetheless affirmed the Supreme Court's power to decide what the constitutional enumeration of powers let India's governments do. Yet India's Constitution does not expressly settle what makes governing actions "with respect to" enumerated powers. Courts must decide what conditions must be met for governing actions to fall within governments' powers. The power to declare the law that answers that question affords India's Supreme Court more adjudicative discretion than the founders recognized.[80]

In its recent landmark rulings recognizing and applying a constitutional right to privacy, the Supreme Court of India found privacy to be a moral concomitant of the Constitution's express commitments to human rights.[81] Like the United States Supreme Court's uniting of illustrative and definitive conceptions through broad readings of the due process clauses, India's Supreme Court has united illustrative and definitive conceptions through broad readings of express constitutional rights within a vision of "transformative constitutionalism".[82] The law of constitutional characterization can complement those conclusions and deepen their textual foundations. Laws that violate human rights are not "with respect to" any matter over which the Constitution confers power. Had the People of India wished to authorize such violations, they would have done so specifically. To put the point another way, there is a presumption of

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[80] CA Deb 13 December 1948, vol VIII, 8.72.57 — Dr. BR Ambedkar: "In a federal constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation which are granted by the Constitution to the particular legislature. If the law made by a particular legislature exceeds the authority of the power given to it by the Constitution, such law would be ultra vires and invalid. That is the normal thing that happens in all federal constitutions. Every law in a federal constitution, whether made by the Parliament at the Centre or made by the legislature of a State, is always subject to examination by the judiciary from the point of view of the authority of the legislature making the law. The 'due process' clause, in my judgment, would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law. The law may be perfectly good and valid so far as the authority of the legislature is concerned. But, it may not be a good law, that is to say, it violates certain fundamental principles; and the judiciary would have that additional power of declaring the law invalid. The question which arises in considering this matter is this. We have no doubt given the judiciary the power to examine the law made by different legislative bodies on the ground whether that law is in accordance with the powers given to it. The question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles."

[81] *KS Puttaswamy v Union of India* (2017) 10 SCC 1; *KS Puttaswamy v Union of India* (2019) 1 SCC 1.

[82] *See*, eg, *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [101], [108]-[110], [122]-[123]; *Joseph Shine v Union of India* (2019) 3 SCC 39 [4], [110], [143], [213], [214]; *Indian Young Lawyers Assn v State of Kerala* (2019) 11 SCC 1 [204], [386], [394], [398].

*un*constitutionality for laws that violate human rights, a presumption that informs the reading of "with respect to".

IV. CONCLUSION

Protecting rights through the law of constitutional characterization deepens the bond between judicial reasoning about rights and the written Constitution. A common law judiciary is attuned both to telling timeless truths and to implementing written rules. The Indian Constitution's enumeration of powers calls for India's Supreme Court to do both in creating the law of constitutional characterization. Enumeration authorizes and obliges the Court to engage in this authentically creative endeavour, because *aboutness* is not a singularity. The Court can and must decide among the myriad ways that governing actions may be "with respect to" enumerated subjects. The Court can and must decide what is necessary to bring actions within powers. The criteria for finding actions within powers cannot be found within the constitutional text itself – that text authorizes dispute resolvers to look beyond itself to find the law of "with respect to" in the reasons that India's Constitution seeks to limit the powers of those who govern.

Within weeks of the draft United States Constitution appearing, a key drafter emphasized that in its pioneering enumeration of powers, the document protected *both* the balance of power between governments *and* the rights of the people. James Wilson concretely contended that Congress's general legislative power to regulate interstate and foreign commerce would not let Congress curtail the freedom of the press. No express bill of rights was needed to achieve this result. If Congress passed a law that could plausibly be characterized as with respect to regulating commerce *and* as with respect to restricting freedom of the press, the courts could choose to treat one characterization as excluding the other. The courts could treat the absence of one as a necessary condition for recognizing the other. However much a law might otherwise be with respect to regulating commerce, it would fail to fall within power if it were also with respect to restricting the press. Enumeration of national powers protected not only a reservoir of state power, but also a reservoir of human rights.

When a written constitution enumerates powers, it authorizes courts to find its contours in, as Justice Chase put it, "the nature of the power, on which it is founded."[83] The written constitution requires its expositors to find its reach in the first principles of the constitutional scheme. Illustrative and definitive conceptions of adjudication are united in this way. India's Constitution invites India's Supreme Court to expound the powers of governments through a law of "with respect to" that both harmonizes those powers with one another and protects the rights of the people.

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[83] *Calder v Bull* 1 L Ed 648 : 3 US 386, 388 (1798).