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Deepa Das Acevedo

University of Alabama - School of Law, ddasacevedo@law.ua.edu

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DEEPA DAS ACEVEDO*

Temples, Courts, and Dynamic Equilibrium in the Indian Constitution†

Must all states have fixed constitutional identities? Does democracy necessarily entail citizen-sovereignty? This Article uses ethnographic data from India to argue that the answer to both questions is “no.” In the aftermath of a massive stampede in 2011, the Kerala High Court initiated an overhaul of the complex executive, legislative, and judicial network that governs the famous Hindu temple at Sabarimala. The court’s conflicting goals were to avoid further consolidating government authority over the temple and to further empower officials so that they could undertake needed reforms. Ultimately the court did both—and neither—in an instance of judicial balancing that reflects the two visions of sovereignty in India. On the one hand, Indian constitutional law and judicial practice reflect a conventional vision of sovereignty, in which sovereign authority is wholly vested in citizens and merely exercised on their behalf by the state. On the other hand, there exists a vision of “divided sovereignty” in which the state, as the agent of reform, has sovereign authority independent of citizens. The productive tension between these two visions, according to which sovereignty is both vested wholly in citizens and divided between citizens and state, is the dynamic equilibrium at the heart of Indian democracy.

INTRODUCTION

A court order determines that women can be banned from a Hindu temple because their presence offends the presiding deity, who is celibate.¹ A statute brings nearly two thousand Hindu temples under government control and directs their incomes into a general

* A.B., Princeton (2006); Ph.D., University of Chicago (2013); J.D., University of Chicago (2016). My thanks to Tom Ginsburg, John Comaroff, and William Mazzarella for reading earlier versions or portions of this paper; to Shyam Balganeshe and Daniel Lee for pointing me toward literature on dynamic equilibrium and sovereignty outsourcing; and, as always, to John F. Acevedo and Mallika Das. Research for this paper was funded in part by a grant from the Social Science Research Council.

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1. See, e.g., *S. Mahendran v. The Secretary, Travancore Devaswom Board*, OP No. 9015/1990-S, discussed in Deepa Das Acevedo, *Celibate Gods and “Essential Practices” Jurisprudence at Sabarimala, 1991–2011*, in *FILING RELIGION: STATE, HINDUISM, AND COURTS OF LAW 101* (Daniela Berti et al eds., 2016).

temple pool for redistribution.² Two federal judges launch an inquiry into whether a “cosmic light” (witnessed annually by a constituency several times the population of Camden, New Jersey)³ is a signal of divine satisfaction or simply man-made fireworks.⁴

It goes without saying that the Indian government—and in the above examples, the State of Kerala—has significant power over the religious lives of its Hindu citizens.⁵ India’s Constitution is relatively up-front about this. At a general level, the Constitution enables the state to regulate or restrict “any economic, financial, political, or other secular activity which may be associated with religious practice.”⁶ As regards Hinduism, the Constitution also empowers the state to throw open “Hindu religious institutions of a public character to all classes and sections of Hindus”⁷ and prohibits the practice of untouchability.⁸ And the special characteristics of this relationship between Hinduism and the Indian state have been ably explored by generations of scholars and judges.⁹

But India’s Constitution also guarantees traditional liberal protections like “freedom of conscience and [the] free profession, practice and propagation of religion.”¹⁰ There’s a kind of cognitive dissonance involved in saying that a constitution protects freedom of religion, with all the baggage about non-involvement that this position entails, and in simultaneously saying that the same constitution is a

2. TRAVANCORE COCHIN HINDU RELIGIOUS INSTITUTIONS ACT & RULES, 1951 (R.P. Remesan ed., 2006).

3. *State & County QuickFacts: Camden, New Jersey*, UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/34/3410000.html> (last visited June 30, 2015) (stating that, according to the 2010 census, Camden’s population was 77,346).

4. See *infra* Part I.A.

5. There can be no question that the state exerts more authority over Hinduism. See, e.g., Deepa Das Acevedo, *Secularism in the Indian Context*, 38 LAW & SOC. INQUIRY 138, 146 (2013) (noting that the Central Wakf Council advises the Indian government respecting Muslim charitable donations, but that overall the state “does not relate to Muslims and Christians in any way that could be considered parallel or analogous to the depth of government involvement with Hindu temples, mutts (i.e., monasteries), and charitable institutions”); VRINDA NARAIN, RECLAIMING THE NATION: MUSLIM WOMEN AND THE LAW IN INDIA 86 (2008) (arguing that “the state has studiously avoided addressing both the issue of gender inequality in Muslim personal law, as well as the enactment of a UCC [Uniform Civil Code]”).

6. INDIA CONST. art. 25(2)(a).

7. *Id.* art. 25(2)(b).

8. *Id.* art. 17. It’s worth noting, too, that “Hinduism” in Article 25(2)(b) is defined as including Buddhism, Sikhism, and Jainism, so that the state has equal authority over the institutions and practices of those faiths, although it doesn’t fully exercise that authority. *Id.* art. 25 (Explanation II).

9. For a thoroughly unrepresentative sample of this enormous literature, see Gurpreet Mahajan, *Religion and the Indian Constitution: Questions of Separation and Equality*, in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 297 (Rajeev Bhargava ed., 2008); C.J. Fuller, *Hinduism and Scriptural Authority in Modern Indian Law*, 30 COMP. STUD. SOC’Y & HIST. 225 (1988); Rajeev Dhavan, *Religious Freedom in India*, 35 AM. J. COMP. L. 209 (1987); J. DUNCAN M. DERRETT, RELIGION, LAW AND THE STATE IN INDIA (1968); Marc Galanter, *Secularism East and West*, 7 COMP. STUD. SOC’Y & HIST. 133 (1965).

10. INDIA CONST. art. 25.

“confrontational document” because of “its commitment to reshap[ing] key structures of the social order.”¹¹ So how can we reduce the dissonance?

One approach has been to say that it’s acceptable for the Indian Constitution to grant the state singular authority over Hinduism, but less appropriate for the state to exercise such authority over other religions. This is because Hindus dominate India’s population and parliament, and so Hindus (who lack an ecclesiastical structure comparable to many Christian communities) are essentially using political institutions to govern and limit themselves.¹² John Hart Ely would probably approve,¹³ but representation-reinforcement arguments rise and fall on the vision of pluralist representation they’re based on.¹⁴ And just what “pluralist representation” ideally or actually means in the Indian context is, to be only mildly facetious, anyone’s guess.¹⁵

Others have sought to overcome the dissonance by changing one of the conflicting “cognitions.” For the most part, this has meant equating “religious freedom” with “secularism,” and then interpreting “secularism” to mean something other than the kind of separation and non-establishment associated with American constitutional jurisprudence. For example, instead of requiring “strict separation,” so-called “Indian secularism” is said to only require “principled distance” or “celebratory neutrality” and “reformatory justice.”¹⁶ The two-step analysis involved in this approach allows some commentators to argue that there’s no cognitive dissonance involved in the state’s simultaneous efforts to

11. GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 216 (2010).

12. Pratap Bhanu Mehta, *Reason, Tradition, Authority: Religion and the Indian State, in MEN’S LAWS, WOMEN’S LIVES: A CONSTITUTIONAL PERSPECTIVE ON RELIGION, COMMON LAW AND CULTURE IN SOUTH ASIA* 56 (Indira Jaising ed., 2005).

13. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

14. Shane Pennington, *Completing Ely’s Representation Reinforcing Theory of Judicial Review by Accounting for the Constitutional Values of State Citizenship*, 15 *TEX. REV. L. & POL.* 219, 220 (2010) (arguing that Ely’s theory depends largely “on the rigor of his conception of ‘American representative democracy,’ which is ‘critically incomplete’ because he ‘overlooks the role federalism plays in our representational scheme’”).

15. Compare Sudipta Kaviraj, *Modernity and Politics in India*, 129 *DAEDALUS*, no. 1, 2000, at 137, 154 (“Indian nationalism . . . retained its confidence in the idea that . . . there was no way of being an Indian without first being a Tamil or Maratha or Bengali. Indian nationalism was therefore a second-order identity . . .”), with Gyan Prakash, *The Modern Nation’s Return in the Archaic*, 23 *CRITICAL INQUIRY* 536, 539 (1997) (arguing that at the turn of the twentieth century, Hindu elites “invoked the image of a universal and singular archaic religion, validated by science, to forge difference into unity, multiplicity into singularity[;] . . . the idea of ancient Hindu science functioned as a project to constitute a modern national subject—homogenous, whole, and pure”).

16. Rajeev Bhargava, *India’s Secular Constitution, in INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES* 105 (Zoya Hasan et al. eds., 2005); Rajeev Dhavan, *The Road to Xanadu: India’s Quest for Secularism, in RELIGION AND PERSONAL LAW IN SECULAR INDIA* 301, 311 (Gerald Larson ed., 2001) (arguing that “Indian secularism” consists of religious freedom, celebratory neutrality, and reformatory justice). See also Seval Yildirim, *Expanding Secularism’s Scope: An Indian Case Study*, 52 *AM. J. COMP. L.* 901 (2004) (describing “Indian secularism” as “a discourse to reconstruct the political space so that religion and the state can co-exist”).

protect freedom of conscience and to reform religious practice.¹⁷ But there's arguably no reason to take that first step.¹⁸

Instead of trying to square the circle, we'd be better served in our efforts to understand Indian jurisprudence on religious freedom by adopting a view that doesn't seek either to minimize the conflict or to justify it using other assertions about Indian democracy that are themselves highly problematic. Put differently, we need to account for the strong versions of both claims—that the Indian state protects religious freedom *and* that it actively seeks to regulate and reform religion. We can do this if we let go of the idea that the purpose of constitutional law is to construct and maintain one particular theory of the state. Or, as the Indian example shows, constitutions and the practices they give rise to can seek to support a perpetual and dynamic equilibrium.¹⁹

This Article makes three contributions to legal scholarship. First, it speaks to scholars of Indian law by proposing that the Indian Constitution is neither “militant” nor “acquiescent” vis-à-vis society.²⁰ Rather, the Indian Constitution encourages a dynamic equilibrium between these two visions of state–society relations. To be clear, I am not arguing for any particular interpretation of constitutional prose (for example, I'm not interested in whether “freedom of conscience” means X, much less in whether X has or hasn't been successfully implemented). Nor am I using “dynamic equilibrium” in the sense of inter-branch contributions to statutory interpretation that's most closely connected to the American Legal Process School of jurisprudence.²¹

17. See Bhargava, *supra* note 16; Dhavan, *supra* note 16; Yildirim, *supra* note 16.

18. See Das Acevedo, *supra* note 5, at 163 (arguing “that the nonsecular actions of the Indian state are reasonable, though not for the reasons most commonly cited” and that we need “to acknowledge that a liberal-democratic state may still have reasonable nonsecular aims”).

19. Michel Rosenfeld has also argued for a “dynamic” understanding of constitutional identity, where the dynamism is between two facets of self-identity: sameness and selfhood. Like Rosenfeld, I think that constitutional identity is something best thought of at the “systemic” level, and in terms of the “essential links between the constitution, its environment, and those who launched it as well as those for whom it was intended.” Michel Rosenfeld, *Constitutional Identity*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 756, 759–60 (Michel Rosenfeld & Andrés Sajó eds., 2012). However, in this Article, I question the degree to which we can confidently identify a constitutional identity (or theory of the state) and show that, at least in the Indian case, there isn't just one. And although there are some similarities between my argument here and what's referred to as the “incrementalist” or “defer[red] decision-making” approach to constitutional drafting, I'm interested in what *has* been decided rather than what *hasn't*. See HANA LERNER, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* 39 (2011) (generally discussing the “incrementalist approach”); Tom Ginsburg & Rosalind Dixon, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 *INT'L J. CONST. DESIGN* 636 (2011) (generally discussing deferred decision making in constitutional drafting).

20. Gary Jeffrey Jacobsohn, *The Sounds of Silence: Militant and Acquiescent Constitutionalism*, in *THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM* 131 (Steven Kautz et al eds., 2009).

21. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 *HARV. L. REV.* 26, 28 (1994) (describing law as “an equilibrium, a state of balance among competing forces or institutions”).

But I *am* claiming that, whatever their specific meaning, important aspects of the Indian Constitution proceed from fundamentally distinct first principles, and that the tension between those principles is meant to be perpetuated rather than resolved.

Second, and following naturally from this first claim, the Article speaks to scholars of constitutional identity and design by showing that democratic government fundamentally does not have fixed, nation-specific meanings or purposes.²² Of course, these scholars are likely to object that thumbnail sketches along the lines of “democracy in India was meant to reform society” are true *in their essentials* or that they aren’t meant to be taken at face value—that when we make such statements, we’re simply engaging in a kind of intellectual shorthand.²³ This may well be, but the shorthand is often taken quite seriously—as, for example, in debates about broadened standing to sue and the distinct concerns it may trigger in India versus the United States.²⁴ The full ramifications of such shorthand are beyond the scope of this Article, but the point that we can empirically disprove such simplistic characterizations is central to its argument.²⁵

22. In a sense, this means I agree with both Laurence Tribe and Gary Jacobsohn on the issue of articulating constitutional identities. Like Jacobsohn, I think it’s fair to speak of “identifiable continuities of meaning” within a constitution. JACOBSON, *supra* note 11, at 4. But unlike Jacobsohn, I’m only interested in tensions between “continuities of meaning” that are *internal* to the written Indian Constitution, and I don’t view this tension as “disharmony” or as a set of “contradictions and imbalances.” *Id.* at 87. Moreover, unlike Jacobsohn (but like Tribe), I am not sure it makes sense to speak of a constitutional identity—whether static or dynamic—because “deeply irreconcilable ideals and premises are at work in the very same text.” Laurence H. Tribe, *The Idea of the Constitution: A Metaphor-morphosis*, 37 J. LEGAL EDUC. 170, 172 (1987).

23. See, e.g., JACOBSON, *supra* note 11, at 18 (describing the Indian Constitution as “in its essentials, predominantly about the urgency of change”).

24. Despite marked political and jurisprudential differences, American scholars of standing generally agree that the worry at the heart of standing debates is, and ought to be, maintaining the separation of powers. See Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551 (2012); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 189 (1992); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). Conversely, Indian conversations on public interest litigation (which eliminated standing requirements in select cases) focused on docket flood in the 1970s and recently switched to expanded standing’s inability to further progressive goals, but they have only minimally emphasized the separation of powers. See, e.g., Deepa Das Acevedo, *Sovereignty Considerations and Social Change in the Wake of India’s Recent Sodomy Cases*, 40 B.C. INT’L & COMP. L. REV. (forthcoming 2017) (discussing shifts in the policy goals of public interest litigation suits as a reflection of dynamic equilibrium); A.S. Anand, *Judicial Review—Judicial Activism—Need for Caution*, 42 J. INDIAN LEGAL INST. 149, 155 (2000) (describing public interest litigation as a “potent weapon” by means of which “the underprivileged and the downtrodden have secured access to court through the agency of a public-spirited person or organization”); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107 (1985).

25. As Elkins et al. argue, “design choices matter”—perhaps in ways we hadn’t thought. The “dynamic equilibrium” discussed in this Article can be understood as a variation on the theme of constitutional flexibility. But “dynamic equilibrium” signals flexibility at the level of underlying impulses rather than of specific rules or articles. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 81–88 (2009).

Third, and following from the second claim, this Article has a few things to say about how anthropology might contribute to empirical legal scholarship. Anthropology has often had a tenuous relationship with law, either because anthropologists have sometimes been preoccupied with whether it makes sense to talk of “the law” at all or because different disciplinary priorities preclude them from making the kind of generalizable normative pronouncements that law folk value (and which economists, among others, are especially happy to provide).²⁶ This Article is hardly a call for a convergence—either of anthropologists to law or of legal scholars to anthropology—that would most likely leave all parties worse off. But it does demonstrate that both sides may be overstating their mutual unintelligibility.

The daily governance of religious institutions is an important part of state control over Hinduism, and this governance occurs at the state and local levels. Consequently, Part I dives deep into the weeds of religion–state relations in a particular Indian state, Kerala. I use ethnographic data to describe the Kerala High Court’s approach to religion–state relations in two instances: during the “cosmic light” investigation mentioned earlier and in the face of appeals to restructure the same landmark temple’s administration. Part II draws on case law from around India as well as on Indian legal and constitutional history to show that the High Court’s approach was not idiosyncratic. It also argues that “dynamic equilibrium” as a theory of constitutional law and judicial behavior is relevant outside the realm of religion–state relations, and perhaps outside India itself.²⁷

I. TEMPLE ADMINISTRATION IN “GOD’S OWN COUNTRY”²⁸

Kerala, the small state at the southwestern tip of India, stands apart on a number of metrics. It has one of the highest literacy rates

26. From the anthropologists’ side, one of the most famous critiques of anthropology–law collaborations is Simon Roberts, *Do We Need an Anthropology of Law?*, 25 ROYAL ANTHROPOLOGICAL INST. NEWS, Apr. 1978, at 4, 4 (calling certain anthropological engagements with law “some of the most wasteful and debilitating quarrels within the discipline” and saying that “there should never have been an anthropology of ‘law’ at all”). A different critique of legal anthropology emerged through the grand 1960s debate between Max Gluckman and Paul Bohannon over whether or not Western legal concepts could be used to understand non-Western legal systems. See MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955); PAUL BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* (1957). Much more recently, Annelise Riles has defended an “anthropology of law” to legal scholars by saying that the interdisciplinary approach offers “an interplay between normativity and reflexivity as modes of knowledge” that constitutes a “significant contribution to legal scholarship today.” Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597, 632 (1994).

27. Much of the information that follows was gathered during fieldwork between June 2009 and September 2011, but I have indicated specific sources including interviews, observation dates, and court filings wherever applicable.

28. The phrase “God’s Own Country” was coined by the civil servant Amitabh Kant for a late-1990s Kerala tourism campaign. AMITABH KANT, *BRANDING INDIA: AN INCREDIBLE STORY* 59 (2009).

in India²⁹ as well as the world,³⁰ a population the size of Canada's with a GDP per person the size of Papua New Guinea's,³¹ and a religious composition that's approximately 56% Hindu, 25% Muslim, and 19% Christian.³² Since 1959, when the Communist Party of India (Marxist) or CPI(M) first won control of the state legislature, Kerala has basically alternated between the CPI(M) and the Indian National Congress.³³ Overall, the state's approach to socioeconomic development has made enough advances in education, land reform, and gender equality to become known as the "Kerala Model."³⁴

But as far as the governance of Hindu institutions is concerned, Kerala is firmly on the same cricket pitch as other South Indian states.³⁵ Keralite temples have extensive administrative needs that have traditionally been met by a mix of local elites and distant rulers. During the colonial era, British officials gradually increased their control over temple administration in the Madras Presidency, which

29. *Compare Census of India 2011—Provisional Population Totals—Rural and Urban Distribution (India, Kerala, Districts)*, CENSUS OF INDIA 2011, http://censusindia.gov.in/2011-prov-results/paper2/data_files/kerala/Pamphlet_kerala.pdf (last visited Mar. 29, 2015) (listing Kerala as having the highest literacy rate in the country at about 94%, with the second highest being Mizoram at 91.30%), *with Tripura Beats Kerala in Literacy*, TIMES OF INDIA (Sept. 8, 2013), <http://timesofindia.indiatimes.com/home/education/news/Tripura-beats-Kerala-in-literacy/articleshow/22416019.cms> (describing Tripura as having the highest literacy rate, 94.65%, just ahead of Kerala at 93.93%).

30. For instance, UNESCO's estimate of the global adult literacy rate in 2012 was 80% for women and 89% for men. *International Literacy Data 2014*, UNESCO INST. FOR STATISTICS, <http://www.uis.unesco.org/literacy/Pages/literacy-data-release-2014.aspx> (last visited May 10, 2015).

31. *Comparing Indian States and Territories with Countries: An Indian Summary*, ECONOMIST (last visited Mar. 29, 2015), <http://www.economist.com/content/indian-summary>.

32. Biju Govind, *Increase in Muslim Population in the State*, THE HINDU (Sept. 23, 2004), <http://www.thehindu.com/2004/09/23/stories/2004092306010500.htm> (attributing these figures to the 2001 census). See also Joanna Sugden & Shanoor Seervai, *Where Are India's 2011 Census Figures on Religion?*, WALL ST. J.: INDIA REAL TIME (Jan. 9, 2015), <http://blogs.wsj.com/indiarealtime/2015/01/09/where-are-indias-census-figures-on-religion/> (noting that, as of January 2015, no religion figures from the 2011 census had been released).

33. The Kerala government's website lists previous chief ministers and the composition of legislatures dating back to 1947. *Chief Ministers Since 1957*, GOVERNMENT OF KERALA, <https://kerala.gov.in/chief-ministers-since-1957> (last visited July 7, 2016).

34. See, e.g., JEAN DRÉZE & AMARTYA SEN, INDIA: ECONOMIC DEVELOPMENT AND SOCIAL OPPORTUNITY (1995); Govindan Parayil, *The 'Kerala Model' of Development: Development and Sustainability in the Third World*, 17 THIRD WORLD Q. 941 (1996).

35. Keralite temples, like temples in other South Indian states, are larger, richer, and more powerful than their North Indian counterparts. As a result, they've been closely intertwined with kingship and executive authority on both literal and figurative levels. On the one hand, the wealth of South Indian temples as well as their status as centers of economic redistribution has meant that they've been incredibly important to South Indian rulers—precolonial, colonial, and postcolonial alike. ARJUN APPADURAI, *WORSHIP AND CONFLICT UNDER COLONIAL RULE: A SOUTH INDIAN CASE* (1981). On the other hand, temple deities are kings in their own right, who personally own the property and movable wealth of their temples. Deepa Das Acevedo, *Divine Sovereignty, Indian Property Law and the Dispute Over the Padmanabhaswamy Temple*, 50 MOD. ASIAN STUD. 841 (2016); Anthony Good, *Law, Legitimacy, and the Hereditary Rights of Tamil Temple Priests*, 23 MOD. ASIAN STUD. 233 (1989).

comprised Malabar (northern Kerala) and all of present-day Tamil Nadu, as well as parts of modern Andhra Pradesh and Karnataka. After initially replacing the rulers who had functioned as patrons and arbitrators of temple disputes, colonial officials eventually reorganized the structure of temple governance itself via Act I of 1925, which created a Hindu Religious Endowments (HRE) board to administer public Hindu temples throughout the Presidency.³⁶ Not only did the HRE system apply directly to Malabar, it also inspired the administrative structure for temple governance in central and southern Kerala (combined into the Indian state of Travancore-Cochin in 1949) as well as the modern state of Kerala (created in 1956).³⁷

Today, public temples in Kerala are governed by three distinct yet overlapping systems. In the first system, five geographically defined statutory boards oversee the daily operations of over 1,700 temples ranging in size from roadside altars to regional pilgrimage centers like the one studied in this Article.³⁸ The boards are rich—richer than any other statutory body in the state—and influential because of their control over valuable state contracts and temple jobs. The most powerful of these boards (and the one discussed later on in this section) is the Travancore Devaswom Board (TDB), which controls over 1,000 temples and is named for the former princely state with whose southern Keralite territory it roughly

36. Madras Hindu Religious Endowments Act, Act I of 1925 (Madras Presidency). See, e.g., Robert Eric Frykenberg, *The Construction of Hinduism as a “Public” Religion: Looking Again at the Religious Roots of Company Raj in South India*, in RELIGION AND PUBLIC CULTURE: ENCOUNTERS AND IDENTITIES IN MODERN SOUTH INDIA 3 (Keith E. Yandell & John J. Paul eds., 2000); EDGAR THURSTON, *THE MADRAS PRESIDENCY, WITH MYSORE, COORG AND THE ASSOCIATED STATES* (Cambridge Univ. Press 2011) (1913) (describing the geography of the erstwhile presidency).

37. The relationship between the British and the princely state of Travancore is especially interesting in the context of temple governance. As Travancore’s indebtedness to Britain grew during the late eighteenth and early nineteenth centuries, so too did Britain’s authority over the kingdom. This finally culminated in the 1810 installation of Colonel John Munro as both British Agent and Dewan (Prime Minister). During the reigns of two queens-regent, Munro promoted greater and more centralized state authority over Hindu temples as an antidote to the corruption of local trustees (with impressive revenue-generation as a fringe benefit). See Deepa Das Acevedo, *Religion, Law, and the Making of a Liberal Indian State* ch. 1 (2013) (unpublished Ph.D. dissertation, University of Chicago) (on file with author); T.K. VELU PILLAI, 3 *THE TRAVANCORE STATE MANUAL* (1940).

38. The five boards are Travancore, Cochin, Malabar (established in 2008), Guruvayur, and Koodalmanickam. The Cochin and Malabar Devaswom Boards (CDB and MDB, respectively) are considerably smaller and poorer than that of Travancore. In keeping with their limited resources as well as the more flexible traditions of temple governance in those regions, the CDB and MDB have far less control over the temples within their jurisdictions. The CDB controls around 420 temples, while the number of temples under the MDB is unclear. Unlike the first three, Guruvayur and Koodalmanickam are responsible only for a single major temple each along with some subsidiary shrines, and are not subject to High Court financial oversight. Interview with Unnikrishnan, attorney for the Cochin Devaswom Board, in Cochin, Kerala (Feb. 11, 2011).

coincides.³⁹ Members of the TDB are chosen by Hindu members of the state legislature and state cabinet.⁴⁰

Second, the state government includes a cabinet-level temple portfolio. This person, the Minister for Devaswom Affairs, isn't nearly as powerful within Travancore as the TDB, but he does oversee a state-wide Devaswom department and his influence is moderately stronger in regions governed by the other temple boards.⁴¹ Within Travancore, the Minister supervises some subsidiary offices jointly with the TDB, although the power-sharing dynamics of these collaborations are constantly shifting. For example, a "Devaswom commissioner" was until recently appointed by the TDB with the High Court's approval, but a few years ago the TDB circumvented the court and appointed the commissioner in conjunction with the state government.

Third, the temple boards are accountable to the Kerala High Court. The chief justice of the High Court appoints two judges—usually one junior and one senior—to the "temple bench," which sits twice weekly to hear matters for all public temples in the state. In the 1980s, the High Court acquired audit powers over the TDB, thanks to a forceful judge (and future Supreme Court justice), K.S. Paripoornan, who firmly believed that the court needed to "pull up these fellows" (i.e., the board officials) by making the TDB's internal functions standardized, transparent, and accountable to another branch of government.⁴² As a result of Justice Paripoornan's reforms, the High Court today considers matters that range from the exceedingly minute (approving a replacement chauffeur for the TDB's president) to the administrative (determining whether local police can lease office space within temple grounds) to the quasi-religious (assessing the relative monetary share, from devotee offerings, of a junior priest who also performs the duties of a senior priest) to, as we'll see, the validity of religious beliefs.⁴³

39. The exact number of temples within the TDB's jurisdiction is unclear. *Compare* Interview with G. Sudhakaran, former Minister for Devaswom Affairs (July 18, 2011) (giving a figure of 1,400 temples), with M.G. Radhakrishnan, *Temple Muddle*, INDIA TODAY (Apr. 9, 2010), <http://indiatoday.intoday.in/story/Temple+muddle/1/92107.html> (referring to 1,210 temples), and TRAVANCORE DEVASWOM BOARD (Mar. 29, 2015), <http://travancoredevaswomboard.org> (referring to 1,248 temples).

40. Given this fact, as well as the degree to which temple boards are constrained by judicial and executive officials, I consider the TDB to be a part of the state even though many of my interlocutors pushed back against this characterization. But even their own terminology—according to which the TDB is "an instrumentality" of the state or a "constitutional authority"—emphasizes the board's deep embeddedness in state government.

41. The current Minister for Devaswom Affairs is Kadakampally Surendran. *Council of Ministers*, NIYAMASABHA, <http://www.niyamasabha.org/codes/cmin.htm> (last visited July 7, 2016).

42. Interview with K.S. Paripoornan, Retired Justice, Supreme Court of India, in Cochin, Kerala (Mar. 11, 2011).

43. Cases on all of these subjects were heard by the Kerala High Court on March 9, 2011. If a public temple wants to spend less than Rs 100,000 (approximately \$1480), it can request approval directly from the ombudsman, but requests beyond that level require an appearance before the temple bench.

Since 2007, the High Court's authority over temples has been bolstered by the creation of a "Devaswom ombudsman" position that is jointly controlled by the chief justice and the temple bench. The ombudsman is responsible for hearing limited funding requests as well as for reviewing the TDB's annual reports and making recommendations to the temple bench based on those reports. Additionally, he can conduct preliminary hearings for grievances against the boards at the plaintiff's request.⁴⁴ Finally, the High Court and a local district judge select a special commissioner whose sole task is to report to the court regarding the management of Sabarimala, the richest temple within the TDB's domain and the scene of the events described below.

A. *The "Star" and the "Lamp"*

Sabarimala, in the words of a former special commissioner, may be "the biggest commercial enterprise in Kerala."⁴⁵ Along with the Guruvayur temple in central Kerala and the Padmanabhaswamy temple in the state capital, Sabarimala is one of the richest religious institutions in India.⁴⁶ But what makes Sabarimala unusual—besides its exclusion of physically mature women—is that it is a vibrant regional pilgrimage center. During the pilgrimage "season" (mid-November to mid-January), thousands of men and boys fly, drive, or train into Kerala and proceed on foot to the temple, walking at least five kilometers and as much as 200 kilometers. Before they embark on this journey, pilgrims must undergo a forty-one-day penance during which they abstain from meat, alcohol, and sex and wear distinctive black clothing.

The climax of Sabarimala's season is the festival of Makarasankranti, or the day when the sun transitions from Sagittarius to Capricorn. It almost always falls on January 14, and is widely celebrated in India.⁴⁷ At Sabarimala, Makarasankranti is the last day of public festivities during the season; after January 14, there are a few events involving the Pandalam family (the temple's former royal guardians) but the public is not permitted to visit again until the temple is reopened on January 20.⁴⁸

As well as marking the finale of the pilgrimage season, Makarasankranti is also considered the most auspicious time to worship Sabarimala's presiding deity, Ayyappan.⁴⁹ Around 6:30 p.m. on January 14, a bright light in the sky becomes visible from the temple

44. Kerala High Court Order No. Omb/Estt/2008.

45. Interview with Ramkumar, Special Commissioner for Sabarimala, in Ernakulam, Kerala (Feb. 1, 2011).

46. Das Acevedo, *supra* note 35, at 856 n.39.

47. Interview with Kandararu Maheswararu, Chief Priest of Sabarimala, in Chengannur, Kerala (July 16, 2011).

48. *Id.*

49. *Id.*

grounds (for the sake of clarity, let's call this the "star").⁵⁰ The star remains visible while Sabarimala's chief priest opens the doors of the inner sanctum to display the deity's image fully attired in ceremonial gold ornaments, and stays visible while the chief priest conducts a *deeparadhana*, or ritual circling of flame before the deity. By the time he finishes, the star has disappeared. At this point, another light (the "lamp")⁵¹ appears in an empty field around eight kilometers away that is believed to be the original site of the temple. The lamp flashes three times while an eagle circles three times overhead, and then the lamp also disappears.⁵²

Together, these phenomena and the fact that the day signals the end of the season mean that tens of thousands of devotees—especially out-of-state pilgrims—aim to be inside the temple complex on Makarasankranti.⁵³ In fact, many arrive a few days early and camp on the fields and steep hills surrounding the temple in order to ensure a good viewing spot.⁵⁴ Unsurprisingly, there's often a huge rush to leave as soon as the Makarasankranti ceremonies conclude, and it was exactly this rush that caused the stampede of January 14, 2011 and the deaths of 102 pilgrims.⁵⁵

On January 20, 2011, during a regularly scheduled session of the temple bench, an irate High Court rebuked the TDB and the state government for the stampede.⁵⁶ After some initial questions about which spots had incurred the most casualties, the senior judge on the temple bench, Thottathil B. Radhakrishnan, turned to the star and the lamp.⁵⁷ He opened by asking if the TDB could define the

50. *Makarajyothi* (*makaram* meaning "Capricorn" and *jyothi* meaning "light" in Malayalam) (translated by author).

51. *Makaravilakku* (*vilakku* meaning "lamp" in Malayalam) (translated by author).

52. Readers should bear in mind that although I distinguish between the phenomena referred to as the "star" and the "lamp" and assign a particular term to each phenomenon, there was no such conceptual clarity or terminological consistency in the real time discussions of these events.

53. Interview with Rahul Easwar, grandson of Sabarimala's Chief Priest, in Trivandrum, Kerala (June 28, 2011).

54. *Id.*

55. *Sabarimala Stampede: 102 Pilgrims Killed, 50 Injured*, NDTV (Jan. 15, 2011), <http://www.ndtv.com/india-news/sabarimala-stampede-102-pilgrims-killed-50-injured-445065>.

56. Kerala High Court, Cochin, Kerala (Jan. 20, 2011). Readers should note that there was no official transcript of the courtroom proceedings, and that all quotations from the proceedings that appear in this Article are drawn from notes I took while attending sessions of the temple bench.

57. It's possible that Judge Radhakrishnan was just following orders. The day before, at a social gathering where Judge Radhakrishnan was present, the chief justice of the High Court voiced his opinion that the root cause of the stampede might rest in how the star and the lamp were perceived by devotees. Likewise, the then-junior judge on the temple bench, "who had 'made his feelings [against pursuing this line of inquiry] clear' at the January 19 meeting," was rotated to another bench within two weeks—although note that judges are regularly rotated between benches, and there is no requirement that both members of the "temple bench" be rotated out together. Interview with K. Balakrishnan, Professor, Nat'l Univ. of Advanced Legal Studies, in Cochin, Kerala (Feb. 21, 2011).

significance of the star and the lamp, and then—unsatisfied with the answer—asked whether they were “man-made.” Since the room stayed silent (a rarity in Indian courts, even at the federal level), Judge Radhakrishnan moved to justify his questions:

See, blind faith is good but when faith and law conflict there is provision in the Constitution to abridge [faith] for public health and morality. . . . If you go by the Directive Principles and Fundamental Duties section, a scientific temperament should be grown up in the people If the *makarajyothi* is man-made, the people should be told.⁵⁸

This, essentially, was the court’s position for the next five weeks. Over that period, the temple bench repeatedly questioned the TDB’s attorneys about the difference between the star and the lamp, whether either was man-made, and if so by whom. Toward the end of the inquiry (i.e., late April), Judge Radhakrishnan’s interest in having these questions answered seemed to stem from his sense that the TDB and other government authorities were profiting from the intense and naive faith of believers—but at the outset, the court’s motive, much less its intended conclusion, was decidedly unclear.⁵⁹ Even more confusingly, all of the court’s questions had been previously and publicly addressed, or were answered within a week of the January 20 session.

To begin with, the chief priest and the state government had already admitted—in public, and at least three years earlier—that the lamp was lit by human beings.⁶⁰ And the ontological nature of the star and the lamp had surfaced several times in public interest suits filed by “rationalist” associations seeking to expose the TDB’s

58. Kerala High Court, Cochin, Kerala (Jan. 20, 2011). Actually, there’s no mention of this in the Directive Principles (which focus on the state’s obligations), but Judge Radhakrishnan was right that “scientific temperament” *does* surface in the Fundamental Duties section (which is citizen-focused): “It shall be the duty of every citizen of India . . . to develop the scientific temper, humanism and the spirit of inquiry and reform.” INDIA CONST. art. 51A(h).

59. On the final day of hearings, Judge Radhakrishnan exclaimed, “See, Sabarimala, what is the presiding deity? What is the presiding deity? Lord Ayyappa. For them”—gesturing to the government’s attorney—“it is Kamadhenu!” Kerala High Court, Cochin, Kerala (Apr. 26, 2011). (Kamadhenu is a divine cow with the power of giving her master whatever material goods he wants; narratives often feature Kamadhenu being abducted by unscrupulous figures executing get-rich-quick schemes.) Despite this cynicism, the court has never really bought into the argument that promoting the lamp as a “miracle” and “spreading superstition” amounts to a violation of the “right to life” guaranteed by Article 21 of the Constitution. *See, e.g.*, Sanal Edamaruku v. State of Kerala & Others, (2011) WP(C) [unnumbered].

60. K.A. Shaji, *Human, All Too Human*, 5 TEHELKA MAG., no. 24 (June 21, 2008), http://archive.tehelka.com/story_main39.asp?filename=Ne210608allhumantoohuman.asp (noting that a member of the government had “urged the . . . government to ‘disclose all truths’ related to [the lamp] and dissociate itself from promoting religious falsehoods”—and that “to the astonishment of all, the Sabarimala clergy have practically endorsed his views”).

manufacturing of the phenomena.⁶¹ Then, late on the very first day of the 2011 stampede hearings, the TDB responded to Judge Radhakrishnan by saying that the star was a “celestial star considered divine.”⁶²

After this unsatisfying and very lawyerly admission, several other public statements made in rapid succession seemingly put the issue of human involvement to rest. On January 22, the TDB’s president—along with a Hindu nationalist leader and representatives of both Sabarimala’s hereditary chief priests and the temple’s former royal guardians—acknowledged to *The Hindu* that the lamp was indeed lit by human beings, but they denied that the TDB had any role in the lighting.⁶³ On January 23, a former Devaswom commissioner wrote an op-ed not only affirming that the TDB was responsible for lighting the lamp *but also* stating that this was specifically done to encourage high attendance during Makarasankranti.⁶⁴ And on January 24—just ten days after the stampede and on the fourth day of the High Court inquiry—Sabarimala’s chief priest held a news conference at which he denied having any knowledge of who was actually responsible for lighting the lamp (but acknowledged it was lit by human hands).⁶⁵

By early March, when the temple bench shifted to various administrative issues facing Sabarimala, two things had happened. First, *no* current TDB official had admitted either in public or to the court that the TDB lit the lamp that, in part, drew hundreds of thousands of valuable pilgrims to Kerala every year. Second, *every* other kind of actor conceivably connected to Sabarimala—priests, ex-government officials, ex-TDB officials, investigative journalists, civic associations, erstwhile royal guardians—had admitted that the TDB *was* responsible for lighting the lamp. And what did the Kerala High Court do at the end of all this? On the final day of the hearings, after nearly six hours of dialogue during a special session held while the rest of the

61. Over the years, three “rationalist” associations have filed public interest suits related to the star and the lamp: the Bharat Yukthivadi Sangham, Kerala Yukthivadi Sangham, and Indian Rationalist Association. (*Bharat* means “India,” *yukthivadi* means “rationalist,” and *sangham* means “association” in Malayalam) (translated by author). “Rationalism” as a form of self-consciously modernist activism has a strong history in South India and in Kerala specifically. The Indian Rationalist Association was one of the earliest rationalist associations; its first convention took place in 1949 in Madras under the auspices of the prominent rationalist and future chief minister of Tamil Nadu, C.N. Annadurai. Moreover, one of the first activists to self-identify as a “rationalist” was the Keralite lawyer Mookenchery Cherman Joseph (1887–1981), who was popularly known as “Yukthivadi M.C. Joseph.” JOHANNES QUACK, *DISENCHANTING INDIA: ORGANIZED RATIONALISM AND CRITICISM OF RELIGION IN INDIA* 94 (2011).

62. Kerala High Court, Cochin, Kerala (Jan. 20, 2011).

63. Radhakrishnan Kuttoor, *Makarajyothi is Man-Made, Aver Leaders*, THE HINDU (Jan. 22, 2011), <http://www.thehindu.com/news/national/makarajyothi-is-man-made-aver-leaders/article1109340.ece>.

64. Radhakrishnan Kuttoor, *TDB Was Lighting the Fire: Ex-Commissioner*, THE HINDU (Jan. 23, 2011), <http://www.thehindu.com/news/national/tdb-was-lighting-the-fire-ex-commissioner/article1116827.ece>.

65. *Makaravilakku Is a Star: Senior Thantri*, THE HINDU (Jan. 24, 2011) (on file with author).

court was on summer holiday, the temple bench declared, “We need only notice that the [TDB] stands to affirm that what is seen as a light is lit every year at [the empty field] as part of rituals No further inquiry is called for regarding faith.”⁶⁶

That declaration was, to say the least, anti-climactic. The twenty-odd people present in the courtroom clapped furiously when the court finally adjourned, but by this time the proceedings had long since turned to administrative concerns and the applause was only tangentially connected to the star and the lamp. And yet, the temple bench’s inquiry—combined with its ruling—had effected something striking: the court had engaged in the reformist task of exposing religious and political machinations without, at least officially, making any “further inquiry . . . regarding faith.” In other words, it had both *done* and *not done* what it set out to do, which was to tell “the people” whether the phenomena of Makarasankranti are divine. In the following section, we’ll see the temple bench carry off a similar balancing act when confronted with the all-too-common problem of bureaucratic redundancy.

B. *A New Board for Sabarimala?*

After the temple bench turned its attention away from the star and the lamp, it began to focus on problems in Sabarimala’s administration. Many of the issues it examined were minute—road and building maintenance, donation-counting procedures—but the court also considered the overall bureaucratic infrastructure of the temple. This wasn’t the first time the bench had engaged in this kind of holistic review: calls for revamping Sabarimala’s governance, and even for overhauling the entire temple board system, surface pretty regularly.⁶⁷ But the range of alternatives presented to the temple bench in 2011 was striking, as was the court’s ultimate conclusion.

One option was to turn to the Indian Administrative Service (IAS). The IAS has inherited a remarkable reputation for cohesiveness, political neutrality, and high-quality personnel from its colonial precursor (the Indian Civil Service), and so it’s often considered something of a bureaucratic Band-Aid.⁶⁸ Moreover, Kerala had already experimented with IAS involvement in temple governance: in 2009, the TDB and CDB had been unseated over corruption worries and an IAS officer was brought in to run the show until new boards could be appointed.

66. Kerala High Court, Cochin, Kerala (Apr. 26, 2011).

67. In 2007, the state government enacted the Devaswom Ordinance—which, among other things, reduced the tenure of the temple boards to two years—in response to widespread concern over corruption. By way of illustration, a former TDB attorney estimated that (in 2011) the going rate for high-level positions in Sabarimala’s administrative hierarchy (*not* the TDB’s) was between fifteen and twenty-five lakhs, or around \$33,000–\$55,000 in then-current U.S. dollars. Interview with Vijayaraghavan, former TDB attorney, in Cochin, Kerala (Jan. 18, 2011).

68. See generally Arudra Burra, *The Indian Civil Service and the Nationalist Moment: Neutrality, Politics and Continuity*, 48 COMMONWEALTH & COMP. POL. 404 (2010).

The experiment worked so well that the Minister for Devaswom Affairs suggested creating a permanent IAS position to oversee Sabarimala.⁶⁹ The Minister for Cultural Affairs did him one better by suggesting that the government install “a permanent organizational structure over and above” the boards and staff it with the IAS.⁷⁰

But despite this glowing track record, the temple bench vacillated when the IAS was suggested in 2011. In its role as financial overseer for the boards, the bench created the position of “special commissioner” and approved the appointment of an IAS officer to fill the spot. The bench also decided that the same IAS officer would chair the committee responsible for implementing a five-year “Sabarimala master plan” that had been accepted back in 2007.⁷¹ At the same time, though, the bench rejected all appeals to insert the IAS at the head of either the TDB or Sabarimala’s governance systems. The bench also later shifted the IAS officer to the lesser position of “Sabarimala festival and chief government co-ordinator” (while retaining him on the master plan committee) and appointed a non-IAS person to the position of special commissioner.

A second option, and by far the most popular one, was to replicate the governance structures of other prominent temples. The most popular candidate was the system used at Tirupati, in Andhra Pradesh, which until 2012 was considered the richest temple in India.⁷² On the first day of the stampede hearings, *The Hindu* was besieged by letters to the editor strongly but vaguely extolling the virtues of the “Tirupati model.”⁷³ Enthusiasm for the model wasn’t limited to the general public, either: Krishnakumar Mangot, the assistant to the Devaswom ombudsman, argued that Sabarimala should institute a

69. Interestingly, the IAS officer was actually brought in by the state government because a public interest litigation suit brought attention to corruption within the TDB and pleaded for judicial oversight of the TDB’s appointment process. Interview with Vijayaraghavan, *supra* note 67.

70. *Kerala Government Prepares Action Plan for Sabarimala*, NDTV (Jan. 22, 2011), <http://www.ndtv.com/india-news/kerala-government-prepares-action-plan-for-sabarimala-445722>.

71. The master plan was developed in conjunction with a private company, Ecosmart, and would require the joint involvement of the TDB, the federal Ministry of Environment and Forests, the Supreme Court, and the Government of Kerala.

72. See, e.g., *Religious Giving: Do Unregulated ‘Temples of God’ Really Serve a Higher Purpose?*, KNOWLEDGE@WHARTON (May 19, 2011), <http://knowledge.wharton.upenn.edu/article/religious-giving-do-unregulated-temples-of-god-really-serve-a-higher-purpose/> (describing Tirupati as “the richest religious establishment in India” and saying that “only the Vatican is richer” than Tirupati’s governing body, the TTD). Tirupati was later overtaken by the Padmanabhaswamy temple in Kerala. See Das Acevedo, *supra* note 35, at 856 n.39.

73. See, e.g., K. Deviprasad, Letter to the Editor, *THE HINDU* (Jan. 20, 2011) (on file with author) (“The introduction of the Tirupati model will surely help change the situation.”); K.K. Kunhikannan, Letter to the Editor, *THE HINDU* (Jan. 20, 2011) (on file with author) (“The introduction of the Tirupati model to address the problem [of the stampede] would definitely help improve the situation.”); Neelandon Kuruvattoor, Letter to the Editor, *THE HINDU* (Jan. 20, 2011) (on file with author) (“The Tirupati model is welcome in Sabarimala.”); V.P. Ramesan, Letter to the Editor, *THE HINDU* (Jan. 20, 2011) (on file with author) (“The Tirupati model will definitely work at Sabarimala.”).

ticket system like Tirupati's in order to control the flow of pilgrims into the temple complex during Makarasankranti. Likewise, Judge Radhakrishnan requested information about Tirupati's employment practices when considering the working conditions of Sabarimala's donation counters.⁷⁴

Tirupati's governing body, the Tirumala Tirupati Devasthanams (TTD), was created in 1933 by the Madras Legislative Assembly to govern Tirupati and a few surrounding shrines.⁷⁵ The magic of the Tirupati model seems to lie mostly in one feature: autonomy. Tirupati's administrators may be more insulated from the political process than the TDB because unlike the TDB, whose five-member board can be filled by virtually anyone the state chooses to patronize, Tirupati's fifteen-member board of trustees must include fixed numbers of women and "scheduled caste" individuals as well as at least three members of the state legislature. Conversely, *only* Tirupati's executive officer and deputy executive officer are selected by the state government.⁷⁶ Finally, the TTD is "only" responsible for Tirupati and its associated shrines—with "only" in quotation marks because the TTD also operates a university, hospitals (including a veterinary clinic), and a priest training center and administers all utilities for the area under its control (which includes several villages). Nonetheless, this does mean that the TTD's income is wholly its own (unlike Sabarimala) and that the interests of its constituent parts are generally cohesive (unlike the TDB).

But despite Tirupati's phenomenal success and the High Court's own episodic interest in pursuing the "Tirupati model," the court has never seriously considered separating Sabarimala from the TDB and granting it greater autonomy. We might interpret the court's resistance as being historically motivated, since Sabarimala has been under the authority of one state or another since at least 1820.⁷⁷ Conversely, the court's resistance could represent a mercenary desire to keep Sabarimala's considerable revenues within the state's control. But neither of these is especially compelling. The High Court

74. Kerala High Court, Cochin, Kerala (Apr. 25, 2011).

75. *Background of TTD's Formation*, TIRUMALA TIRUPATI BALAJI, <http://www.tirumalainfo.com/ttdAbout.html>. See also Burton Stein, *The Tirupati Temple: An Economic Study of a Medieval South Indian Temple* (1957) (unpublished Ph.D. dissertation, University of Chicago) (available on ProQuest).

76. Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act § 96 ("Constitution of Board of Trustees") (1987) (Andhra Pradesh).

77. The Pandalam family were minor chieftains and vassals to the rulers of Travancore. They maintain that Sabarimala's revenues were mortgaged to Travancore in 1794 to pay Pandalam's share of the defense against the Mysorean attack, and that this arrangement was revised in 1820 to enable Travancore's direct administration of Sabarimala and its related properties. Interview with Ramavarma Raja, head of the Pandalam family, in Ernakulam, Kerala (July 25, 2011). Of course, to the extent that the Pandalam family or its agents were themselves involved in the daily administration of Sabarimala (which is hard to determine at this point), Sabarimala has been administered by a "state" for much, much longer.

has been more than willing to innovate in the realm of temple governance, and—far from trying to hoard revenue for another branch of government—it has repeatedly tried to mitigate the often extractive qualities of state authority vis-à-vis temples (as with the star and the lamp).⁷⁸ Besides which, the desire to retain Sabarimala’s revenues within the larger TDB system *isn’t* self-evidently mercenary. The vast majority of temples would cease to exist without the redistributive system operated by the boards. To the extent that we think these dependent temples are worth maintaining, there’s some reasonable justification for appropriating and redistributing the income of rich temples like Sabarimala.⁷⁹

The final option for administrative overhaul that was proposed in 2011 was also by far the most ambitious: replace the five temple boards with a single “Unified Devaswom Board” (UDB) in the hopes that centralization would produce greater efficiency. This wasn’t the first time a UDB had been suggested. In 1990, a court-appointed committee reported that “[m]any persons who wrote to us and had discussions with us made the point that the unification of laws relating to the three areas of the State was vital for improving the management, upkeep and maintenance of devaswoms”⁸⁰ And a court-appointed (or at least court-brokered) UDB would fit perfectly within the vision of uniform, transparent, and judicially-enforced temple governance that was actively pursued by Justice Paripoornan and others in the 1980s and 1990s, and that still remains powerful within the boards and the High Court today.

Nevertheless, the High Court has never warmed to the idea of a UDB. No doubt this is partly because getting rid of the boards is politically infeasible, but it’s also because administrative uniformity—despite its aura of efficiency—doesn’t fit comfortably with the court’s understanding of temples as deeply local institutions. “The needs of . . . temples definitely vary,” Judge Radhakrishnan said during the 2011 hearings; “there cannot be one standard form.”⁸¹

By one means or another, the proposals for regulatory overhaul sought to fix Sabarimala’s administrative problems by consolidating power over the temple. The temple bench, however, rejected all these overtures. Instead of appointing an IAS officer at the top of Sabarimala’s regulatory pyramid, the court appointed one somewhere in the middle, then removed him and created another position for him—all of which resulted in a net gain in personnel. It re-endorsed

78. For example, during the Sabarimala administration hearings, the TDB requested permission to build and lease shops along the forest trekking path. Judge Radhakrishnan reacted strongly, shouting that the TDB was behaving “as if *sannidhanam* [the path] and [the river] Pampa are shopping centers instead of pilgrimage points!” Kerala High Court, Apr. 26, 2011 (Cochin, Kerala).

79. Das Acevedo, *supra* note 5, at 160.

80. V. RAMACHANDRAN, REPORT ON TRAVANCORE AND COCHIN DEVASWOM BOARDS 68 (1990).

81. Kerala High Court, Cochin, Kerala (Apr. 6, 2011).

the “master plan,” which required cooperation between various federal and state agencies. And it rejected proposals like the UDB and the Tirupati model that would have centralized authority, either over Sabarimala alone or over all public temples in Kerala.

At the same time, we can hardly say that the court objects to centralization because it dislikes heavy state oversight. In fact, the last three decades have witnessed an intensification of state authority over temples as well as a proliferation of administrative personnel. Since the 1980s alone, the court has assumed audit powers over the TDB, formed another temple board (the Malabar Devaswom Board), and created several new temple administration positions (the ombudsman, Devaswom commissioner, Sabarimala special commissioner, and Sabarimala festival coordinator). More individuals and entities than ever before share in the responsibility of governing Sabarimala, and more aspects of the temple’s existence are subject to official governance.

Nor has the court always gained from the growth in state authority; in many cases it has either ceded some of its recently acquired authority to other actors or refused to acquire more authority over temple administration in the face of overt requests to do so.⁸² “We don’t want the Sabarimala Sastha [Ayyappan] to be subservient to the High Court,” joked Judge Radhakrishnan.⁸³ He may simply have been lightening the mood in an otherwise tense courtroom (it was the penultimate day of the special hearings) but Radhakrishnan’s words can just as easily, and truthfully, be taken at face value.

II. DYNAMIC EQUILIBRIUM

So what do we make of the High Court’s behavior over the star and the lamp, as well as its unwillingness to consolidate authority over Sabarimala? Perhaps the court merely lost the courage of its convictions in both instances and avoided the hard work of unmasking or disassembling existing practices. Conversely, the court may have just been seeking to disingenuously “hide” state authority over Sabarimala by raising questions it had no intention of answering, or rejecting some solutions but adopting others with similar consequences. Or finally, maybe the court simply reasonably changed its mind in response to information gained during the proceedings.

Each of these explanations is unsatisfactory in its own way. The first (“cold feet”) explains the court’s behavior by characterizing it as exceptional, but doesn’t explain why an otherwise “activist” court (functioning as part of an “activist” judiciary) should falter in two markedly different contexts. Nor can it adequately account for the fact that the Kerala High Court has behaved similarly in other instances

82. See *infra* Part I (discussing changes in the appointment process for the Devaswom commissioner).

83. Kerala High Court, Cochin, Kerala (Apr. 25, 2011).

not limited to Sabarimala, or that other courts have behaved similarly outside of Kerala.⁸⁴

Conversely, the third explanation (“information gathering”) explains away recurring judicial approaches to the state governance of religion as the ordinary result of courtroom processes. It inadequately accounts for the court’s decision to launch a *suo motu* inquiry in the first place, as well as the fact that the court often has considerable prior knowledge regarding the issues it sets out to tackle. In other words, the “information gathering” view myopically focuses on what happened in the courtroom while leaving unanswered the question of why it happened as it did.

The second explanation (“sneaky regulation”) is the most problematic because it assumes that the High Court is a strikingly—and consistently—self-aware Machiavellian actor. Even if we’re willing to assume the worst of judicial motives (and it’s not clear we should),⁸⁵ it strains common sense to believe that a two-judge bench with fairly frequent turnover will consistently reflect disingenuous motives over a period of more than thirty years.⁸⁶

Instead, as I’ll argue below, the temple bench’s behavior is best understood as reflecting a deep and reasonable commitment to conflicting constitutional impulses. Those impulses concern the locus of democratic sovereignty, which is conventionally—albeit in India not entirely—held to be the citizenry.

A. *Divided and Undivided Sovereignty*

The idea that democracy in India is premised on something other than conventional notions of citizen-sovereignty raises the question, *just what are those conventional notions?* Contract theories of the state are in some sense like cosmological turtles—they can be traced as far back as you like—but (speaking purely for the Western line of turtles) whether we take the American, Austinian, Hobbesian, Rousseauian, or Roman version, the fundamental idea is that sovereignty is like an object whose ownership can’t really be shared. What to do when, as always, sovereigns need to delegate some of their authority to rule effectively? And even more vexingly, what about sovereigns who are

84. Das Acevedo, *supra* note 35, at 858–59 (regarding the High Court’s handling of the Padmanabhaswamy treasure scandal); Fuller, *supra* note 9.

85. As we’ve already seen, the High Court views state authority over temples with decidedly mixed feelings, so it’s not clear that it would *want* to stealthily expand that authority. The court is also wary of being used as a pawn by power-hungry temple administrators. For instance, the Cochin Devaswom Board once asked the court to use its audit powers to grant blanket permission for a building project. Judge Radhakrishnan declined and, in granting more limited permission to the CDB, he noted wryly that if “the High Court said ‘approved’, then . . . *khana, pina, sona* [eating, drinking, sleeping] . . . everything by way of repairs, by way of audit.” Kerala High Court, Cochin, Kerala (March 9, 2011).

86. Interview with K. Balakrishnan, *supra* note 57 (stating that benches at the Kerala High Court are usually reassigned every twelve to fifteen months by the chief justice).

non-corporeal, as they always are when “the people” are said to be in charge?⁸⁷

Some responses have been to effectively deny the possibility of sovereignty in such situations. Hobbes took this route when he said that the social contract was constructed in one step that vested no right of recall in the people, and that the sovereign’s actions didn’t necessarily reflect the popular will.⁸⁸ So did Rousseau, who solved the problem of delegation by making the entire citizenry sovereign. Indeed, basic democratic theory also answers that sovereignty remains indivisible, because it is vested wholly in citizens and merely exercised on their behalf by the state.

The difference is that democratic politics allows for the possibility of meaningful delegation by non-corporeal sovereigns.⁸⁹ And although this view has come under increasing critique precisely because of the worry that delegates necessarily usurp the authority entrusted to them,⁹⁰ democratic politics is still built on the idea that “the people” own sovereignty and the state conditionally exercises it on their behalf. In other words, per the conventional vision, popular sovereignty is undivided (because it’s wholly vested in citizens) and popular sovereignty “fails” when the peoples’ representatives substitute their own will for that of the sovereign.

But if this is the fiction at the heart of democratic politics, it’s only half the story in contemporary India. India’s constitutional framers were peculiarly doubtful that the country’s new sovereigns could fully and responsibly exercise their authority. This was perhaps never truer than in the case of religion, where the framers worried that discriminatory and oppressive religious practices would limit the transformative potential of independence.⁹¹

87. Daniel Lee, *The Right of Sovereignty and the Exercise Thereof: Civil-Law Origins of a Public Law Distinction*, Presentation at the Law, Culture and Society Workshop at the University of Chicago (Feb. 22, 2012).

88. See, e.g., Hannah Pitkin, *Introduction to THE CONCEPT OF REPRESENTATION 1* (Hannah Fenichel Pitkin ed., 1967).

89. Thus, for instance, according to J.P. Canning, Baldus maintained that “[t]he people is the source of its officers’ power, and concedes to them just as much power, and tenure of office as it wishes. . . . This is the conception of representation essential to the theme of popular sovereignty.” J.P. Canning, *The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries*, 1 *HIST. POL. THOUGHT* 9, 29 (1980). Of course, theorists like Hannah Pitkin argue that grounding successful representation in the right of recall overly emphasizes the formalistic elements of initiation and termination, and tells us nothing about “what is supposed to go on *during* representation.” HANNAH PITKIN, *REPRESENTATION* 9 (1969).

90. See, e.g., ROBERT C. GRADY, *RESTORING REAL REPRESENTATION* 5 (1993) (setting forth prescriptions for “how citizen representation can be restored to its ‘pivotal’ role in politics”).

91. See P.N. Bhagwati, *Religion and Secularism Under the Indian Constitution*, in *RELIGION AND LAW IN INDEPENDENT INDIA* 35, 43 (Robert D. Baird ed., 2d ed. 2005):

[India’s constitutional framers] knew that, left to itself, religion could permit orthodox men to burn widows alive on the piers [sic] of their deceased husbands. It could encourage and in its own subtle ways, even coerce indulgence in social evils like child marriage or even crimes like human sacrifice or it

At the same time, the Constitution doesn't simply authorize the state to regulate and reform religion for the purpose of preventing third-party effects like discrimination and oppression. Third-party effects are often absent, since the state seeks to support and celebrate Hinduism as well as to limit the oppressive and discriminatory consequences of some Hindu practices. More importantly, the Constitution goes far beyond granting the state minimal discretionary authority to realize specific goods set out in advance by the people being regulated. It envisions a state with huge independent discretion to control social ordering; for instance, it can regulate *anything* touching the secular aspects of religion. Having that kind of discretion baked right into one's constitutional cake means that sovereignty *can't* be wholly owned by citizens: it has to be shared by both citizens and the state.⁹²

Of course, *any* constitution that protects rights necessarily grants the state authority to define and limit the scope of those rights. When the ostensibly noninterventionist U.S. Constitution provides that the state shall not create laws "respecting an establishment of religion, or prohibiting the free exercise thereof,"⁹³ it enables—and indeed forces—the state to determine what counts as "religion."⁹⁴ No matter how mild-mannered the constitutional prose, the effects it has on religious practice are likely to be profound, as well as potentially unpleasant.⁹⁵

But the Indian Constitution is in a class, more or less, of its own.⁹⁶ Indian courts *intentionally* and *proudly* act as religious exegetes, whereas their American counterparts (for example) "have always been shy about entering this arena."⁹⁷ Indian judges are required to do *more* of this exegesis because so many areas of Indian law—family, trust, penal, and electoral law, to name a few—are

could consign women to the perpetual fate of devadasis or relegate large sections of humanity to the sub-human status of untouchability and inferiority.

It's perhaps worth noting that Bhagwati is one of the most well-known and most "activist" former justices of the Indian Supreme Court.

92. I'm essentially characterizing India's approach to regulating religion as a kind of "political paternalism." Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1162 (2003) (defining "political paternalism" as the idea that "it is legitimate for private and public institutions to attempt to influence people's behavior even when third-party effects are absent").

93. U.S. CONST. amend. I, cls. 1–2.

94. See generally WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005).

95. *Id.* at 5, 7 (observing that "legally defined orthodoxy, not sincerity, was the final standard" used in a case about religious symbols in a Florida cemetery and asking whether the plaintiffs had consented to "ill-informed and sometimes humiliating badgering about their religious beliefs and practices").

96. See, e.g., Ran Hirschl, *Comparative Constitutional Law and Religion*, in *COMPARATIVE CONSTITUTIONAL LAW* 422 (Tom Ginsburg & Rosalind Dixon eds., 2011) (identifying eight constitutional approaches to religion ranging from the most to the least separation between religion and state, and placing India in the seventh category, just shy of "strong establishment" countries like Iran, Egypt, and Pakistan).

97. SULLIVAN, *supra* note 94, at 100.

either explicitly based on religious identity or take religious identity into serious consideration.⁹⁸ Yet, unlike courts in avowedly or essentially theocratic states, Indian courts do all of this as the judicial wing of a secular democratic state. And since 1971, they have done so with almost total immunity as a result of the substantive limits on constitutional amendment created by the “basic structure doctrine”—limits that are applicable to “all forms of state action,”⁹⁹ including “ordinary legislation and executive action.”¹⁰⁰ Because “no basic feature of the constitution is embodied in a single article of the constitution,”¹⁰¹ even constitutional amendments cannot alter the state’s role in regulating religion if, as is highly plausible, that role is deemed to be a “basic feature.”

Put differently, in interrogating the ontological nature of the star and the lamp, and in increasing the number and kinds of officials overseeing Sabarimala, the Kerala High Court’s temple bench suggested that the state *can* legitimately participate in ordering the sphere of religious activity. At the same time, in refusing to make an official declaration about the star and the lamp and in refusing to fully empower official authority over Sabarimala, the bench affirmed that religious activity should be protected from state involvement. The bench’s seemingly inconsistent actions reflect two different (and constitutionally supported) ideas about who should possess sovereign authority in India: citizens only, or both citizens and the state. By adopting a “both-and” approach rather than fully expanding or retracting state authority over religion, the court stayed true to both visions and maintained the dynamic equilibrium between them that is at the heart of Indian democracy.¹⁰²

B. *Dynamic Equilibrium*

“Dynamic equilibrium” describes more than India’s approach to religion–state relations, but it’s perhaps easiest to see in the relationship between government and organized religion (especially Hinduism).¹⁰³

98. Marc Galanter, *Hinduism, Secularism, and the Indian Judiciary*, 21 PHIL. E. & W. 467, 468–69 (1971).

99. SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE*, at xxix (2009). It’s worth noting that there is no widely accepted list of “basic features.”

100. *Id.* at xxi.

101. *Id.* at 87.

102. Others have described India using terminology that’s similar to “dual sovereignty,” but to different effect. For example, Krishnaswamy says that “the only satisfactory account of sovereignty in the Indian Constitution must embrace an institutionally dispersed concept of sovereignty which is both legal and political in character and is composed of multiple and unranked sources of sovereign power.” KRISHNASWAMY, *supra* note 99, at 211. However, Krishnaswamy’s assertion comes at the end of his in-depth analysis of the basic structure doctrine and is left somewhat tantalizingly unexplored.

103. Shyamkrishna Balganes, *Striking a Uniquely Indian Balance: Innovations in Indian Intellectual Property Law*, Presentation at the University of Chicago Symposium: India in the Global Legal Context: Courts, Culture, and Commerce (Apr. 4, 2014).

For one, we have considerable knowledge regarding the perpetually vexing issue of framers' intent: religion–state relations were an exceptionally well-discussed feature of the Constituent Assembly debates, and those debates have themselves been excellently documented and discussed.¹⁰⁴ More importantly, India experienced relative continuity between the people who passed the Constitution and those who—judicially and legislatively—first acted upon its approach to religion, particularly Hinduism.¹⁰⁵

The first two decades of independent India (which roughly coincided with Nehru's prime ministership) saw a great deal of activity as the state sought to live up to the reformist principles of a new Constitution that prohibited untouchability and opened up the secular aspects of religion to state oversight.¹⁰⁶ For instance, in 1955–1956, Parliament passed four pieces of legislation that reconstructed and reformed Hindu personal law, adding modernizations like divorce and removing outdated practices like polygamy.¹⁰⁷ In 1958 and '59, the Supreme Court decided important cases regarding access to Hindu temples and what counted as a temple for the purposes of Article 17's prohibition of untouchability.¹⁰⁸

Yet in the midst of this project to reform Hinduism, the state—whether federal or provincial, legislative or judicial—hasn't gone all the way. Instead, it has (occasionally) held itself back. Restraint has often been a political necessity, as when Nehru compromised with religious communities by relegating the call for a Uniform Civil Code to the non-justiciable Directive Principles section of the Constitution.¹⁰⁹ Likewise, politically motivated restraint characterized the governmental response to the high-profile *Shah Bano* case of 1985, when

104. See generally *Constituent Assembly Debates (Proceedings)*, PARLIAMENT OF INDIA—LOK SABHA—HOUSE OF THE PEOPLE, <http://loksabha.nic.in/> (choose “Debates,” then “Constituent Assembly Debates,” then the dates or keywords of choice); see also Mahajan, *supra* note 9.

105. The Hindu Code bills were passed by independent India's first elected Parliament, which succeeded the Constituent Assembly as India's governing body and sat from 1952–1957. While it's a doubtful proxy for continuity, it may be worth noting that 208 of the 389 seats in the Constituent Assembly and 364 of the 489 seats in the first Parliament were held by Nehru's Indian National Congress. See *General (1st Lok Sabha) Election Results India: India General Election Results—1951*, ELECTIONS. IN, <http://www.elections.in/parliamentary-constituencies/1951-election-results.html>.

106. INDIA CONST. arts. 17, 25(2)(b).

107. The Hindu Code bills include the Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955; the Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956; the Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956; and the Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956. For an impassioned pre-passage defense of the bills, see Renuka Ray, *The Background of the Hindu Code Bill*, 25 PAC. AFF. 268, 277 (1952) (stating that “[i]n many quarters [the bills'] fortunes are regarded as a measure of the strength of the elements of progress and reaction”).

108. INDIA CONST. art. 17; *Sastri Yagnapurushdasji v. Muldas Bhundardas Vaisya*, AIR 1966 SC 1119; *Sri Venkataramana Devaru v. State of Mysore*, AIR 1958 SC 255.

109. Deepa Das Acevedo, *Developments in Hindu Law from the Colonial to the Present*, 7 REL. COMPASS 252, 258–59 (2013).

Rajiv Gandhi's administration reversed course on expanding the rights of Muslim women upon divorce.¹¹⁰

But not all of this restraint is politically motivated: some of it is mandated by the Constitution itself. In keeping with the idea that religion is a sphere of personal activity (although, of course, in India it is also a sphere of group activity), the Supreme Court declared that the essential, and thus constitutionally protected, elements of a religion must be determined with respect to the religion itself.¹¹¹ The "essential practices" doctrine has sometimes afforded religious communities a little elbow room—for instance, the TDB has successfully mounted an essential-practices defense in suits targeting Sabarimala's exclusion of physically mature women.¹¹² Admittedly, the doctrine has just as often allowed the Court to define the essence of religion in ways that make it conform to reformist principles. In *Seshammal*, for instance, the Supreme Court held that temple priests needn't be hereditary appointees (and thus exclusively Brahmin), adding that the plaintiffs' assertion to the contrary was based on faulty exegesis.¹¹³ This process of interpreting away conflict likely seems suspicious—if not for the sheer shock value of Supreme Court justices parsing Sanskrit texts, then because it just seems too sneakily convenient.

But we shouldn't be *totally* cynical about this kind of reform-by-exegesis. For one thing, as a means of changing social norms it's just as available to citizens as to the state: the plaintiffs in the Sabarimala women's entry suit drew on customary and eyewitness accounts to show that, *properly understood*, temple ritual had *never* required a ban on women. Just as importantly, reform-by-exegesis is a perfectly acceptable religious practice: "religious texts are continually reinterpreted by reformists in accordance with the perennial goal of 'recovering' the original truths lost by subsequent misinterpretations."¹¹⁴ We might not go so far as to say that Indian courts and parliaments *should* engage in reformist exegesis, but we should resist characterizing their efforts as uniquely disingenuous.¹¹⁵

110. Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 3 SCR 844 (concerning a sixty-two-year-old Muslim woman's suit for alimony). Under pressure from conservative Islamic leaders, Parliament reversed the Supreme Court judgment in her favor and passed the rather ironically named Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25, Acts of Parliament, 1986, which sought to completely eliminate divorcées' right to alimony. Interestingly, however, some commentators argue that the statute's wording combined with liberal judicial interpretation have resulted in a net improvement for Muslim women. See, e.g., Flavia Agnes, *Economic Rights of Women in Islamic Law*, 31 ECON. & POL. WKLY. 2832, 2836–37 (1996).

111. Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282. It should be noted that the case largely upheld the temple entry statute challenged by the plaintiffs.

112. S. Mahendran v. The Secretary, Travancore Devaswom Board, OP No. 9015/1990-S.

113. *Seshammal v. State of Tamil Nadu*, (1973) 3 SCR 815.

114. Fuller, *supra* note 9, at 234.

115. *Contra* Mehta, *supra* note 12 (arguing that the Indian Parliament is effectively a Hindu parliament because of the numerical majority of Hindu members, and that in the absence of a Hindu ecclesiastical hierarchy it's appropriate for Parliament to create laws governing the Hindu community).

C. *On the Combinations and Permutations of Liberal Democracy*

My claim that Indian judges restrain themselves even as they engage with religion to a striking degree isn't mine alone.¹¹⁶ Neither is my suggestion that the dual goals of restraint and reform exist in tension with one another.¹¹⁷ But what previous commentators have overlooked is the possibility that this tension is an intentional *and* productive feature of Indian constitutionalism writ large (and by extension, of Indian democracy) rather than being accidental, pathological, or specifically about religion.¹¹⁸

Why should we view this dynamic as intentional? Because, as the beginning of Part II.B pointed out, we know a great deal about the process of constitutional drafting in India and what the various articles of the Constitution were intended to achieve. Because the people who drafted the Constitution were largely also the people who wrote early statutes, like the Hindu Code bills, which further defined religion-state relations.¹¹⁹ And because the federal judiciary has repeatedly worked to restrain itself and other state branches even as it has tried to reform religious institutions and practices.

It's also more *productive* to maintain an equilibrium between reform and restraint (and the visions of divided and undivided sovereignty they correspond to) than to seek resolution in either direction. The state in India was always meant to do more than preserve and protect—when Nehru opened the Constituent Assembly, he did so by instructing it to “free India through a new constitution[,] to feed the starving people, and to cloth[e] the naked masses[,] and to give every Indian the fullest opportunity to develop himself according to his capacity.”¹²⁰ Conceptualizing sovereignty as being divided between the people and the state enables the state to undertake the kind of broad and often unpredictable reforms required to construct

116. See Bhagwati, *supra* note 91; Rajeev Bhargava, *Democratic Vision of a New Republic: India, 1950*, in TRANSFORMING INDIA: SOCIAL AND POLITICAL DYNAMICS OF DEMOCRACY 26 (Francine R. Frankel et al. eds., 2002); Fuller, *supra* note 9.

117. See JACOBSOHN, *supra* note 11.

118. Other descriptions of this tension—many of them by supporters of India's approach to religion-state relations—have used words like “wrestling” (Bhargava, *supra* note 116, at 39), “stranglehold” (ROCHANA BAJPAI, DEBATING DIFFERENCE: GROUP RIGHTS AND LIBERAL DEMOCRACY IN INDIA 46 (2011)), or “contradiction” (LLOYD I. RUDOLPH & SUSANNE HOEBER RUDOLPH, IN PURSUIT OF LAKSHMI: THE POLITICAL ECONOMY OF THE INDIAN STATE 38 (1987)). Even those who have emphasized the positive potential of this dynamic have conceived of the tension between reform and restraint as specific to religion and secular governance. See, e.g., terms such as “principled eclecticism” (MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (1984)); “principled distance” (Bhargava, *supra* note 16), and “celebratory neutrality” (Dhavan, *supra* note 16) that gesture toward the tension but are limited to describing religion-state relations in India.

119. See *General (1st Lok Sabha) Election Results India: India General Election Results—1951*, *supra* note 105.

120. CONSTITUENT ASSEMBLY OF INDIA: DEBATES, vol. 2 (Jan. 22, 1947), <http://parliamentofindia.nic.in/ls/debates/vol2p3.htm> (statement of Hon. Pandit Jawaharlal Nehru) (official translation from Hindustani).

a more equitable society. It also acknowledges some longstanding and valuable relationships between the state and society, as we saw with the colonial and precolonial regulation of Hindu institutions in Part I. At the same time, restraining the state by demarcating some things (like ontological truths) as being beyond its purview gives meaning to the fundamental break from colonial governance and signals popular appropriation of political power. A state that reaches too far into citizens' lives ceases to represent and starts to merely rule.

All of this is to say that the dominance of either view would preclude ends that have been deemed essential to good governance in modern India. The goods of liberal democratic politics—particularly the supremacy of the individual over the group, and of the people over their government—are not the goods of Indian politics *in their entirety*. There are also other goods—which we might call *communal* (as Hindu nationalists often do)¹²¹ or *ameliorative* or *confrontational* (as Gary Jacobsohn sometimes does)¹²²—that, regardless of the name we use, point to the idea that groups sometimes trump individuals, and that government can reshape society in ways that society could not possibly have requested.¹²³ That neither vision of sovereignty dominates the courts indicates health rather than sickness, and particular moments of instability are caused by the prioritization (by citizens and by courts) of one view over the other within a specific context.

This doesn't mean that liberal democratic government takes a fundamentally different form in India. That line of thinking is one I'm generally suspicious of, as well as one that I've already criticized in the specific case of "Indian secularism."¹²⁴ When I say that *one element* of India's dynamic equilibrium is a classically "liberal" vision of democratic sovereignty, I mean just that: liberal democracy has, in India, been partnered with a contrasting theory of the good life and the means of achieving it. In this sense, I agree with Tribe that it is "profoundly anti-constitutional to read substantive, enlightenment-based

121. "Communal" and "communalism" have a complicated history in India, but they generally refer to a politics based on religious identity. *See, e.g.*, VINAYAK DAMODAR SAVARKAR, *HINDUTVA: WHO IS A HINDU?* 125–26 (5th ed. 1969) (discussing the appropriateness of "special and communal representation" for Muslims, Sikhs, and other religious communities, and arguing that such representation would be acceptable for Sikhs if they agreed to be classified "as Sikhs religiously, but as Hindus racially and culturally").

122. *See, e.g.*, GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 15 (2003) (discussing restrictions on religious speech in the context of "the ameliorative commitments of the Indian Constitution"); Gary Jeffrey Jacobsohn, *Revolution or Evolution: The Challenges of Constitutional Design*, 48 *TULSA L. REV.* 235, 242 (2012) (reviewing HANA LERNER, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* (2011)) ("The intentions behind the [Indian] constitution were confrontational.").

123. GURPREET MAHAJAN, *IDENTITIES AND RIGHTS: ASPECTS OF LIBERAL DEMOCRACY IN INDIA* 4 (1998) (arguing that "the Indian Constitution deviated from the liberal framework" in its valuation of group life).

124. Das Acevedo, *supra* note 5.

ideals” completely out of a document that includes them, simply because the same document contains other ideals that we’ve chosen to emphasize in our descriptions of the document.¹²⁵

Finally, this also doesn’t mean that “dynamic equilibrium” is itself a constitutional identity of the type that Jacobsohn identifies and Tribe rejects. After all, there is no substance to the equilibrium itself. And although I suppose we could say that this kind of instability is itself a “constitutional identity,” I’m not sure we gain anything by doing so. The real value in thinking about dynamic equilibrium and the absence of defined constitutional identity in India is that it suggests liberal democracy can be based on something more than a theory of citizen-sovereignty. If my characterization of sovereignty in India is correct—and, of course, if we can agree that India is a liberal democracy—then we need to think seriously about what exactly characterizes liberal democratic governance.

CONCLUSION

As promised, this Article started out with a few anecdotes about temples in a small southwestern Indian state and ended up with broad claims about the theoretical underpinnings of democratic governance anywhere in the world. Along the way, I suggested that democracy in India envisions two very different forms of sovereignty: one where sovereignty vests wholly in citizens, and another where citizens share their status as sovereigns with the state. And, conveniently, I left the full consequences of this argument for democratic theory lying around to be picked up another day, in another paper.

But there was one more thing this Article set out to do, and that was to show that anthropology has distinct contributions to offer legal scholarship—even in the august and theoretically weighty realm of constitutional law. If we had simply read the orders and decisions produced by the Kerala High Court in 2011, we might have come away with a vision of Indian law and politics that saw them as committed to some (comparatively weak) form of governmental restraint. This would have been wrong. If we had simply read *previous* decisions by the temple bench and other federal courts, we might have decided that Indian courts observe almost no restraint during their forays into religion, or that they’re just very confused. This too would have been wrong. What observations, conversations, and a commitment to ethnography contributed toward this journey was a narrative with which to connect seemingly conflicting pieces of information. And that is powerfully valuable across disciplines.

125. Tribe, *supra* note 22, at 172. See also BAJPAI, *supra* note 118, at 24 (arguing that the Constituent Assembly and thus the Constitution moved significantly away from the primacy of communities and towards a politics based on the individual, such that “Indian nationalism spoke out in a common, liberal voice against group-differentiated rights in this period”).

