# CONSISTENT REVIEWS IN AN INCONSISTENT COURT: DELINEATING THE CONTOURS OF JUDICIAL REVIEW WITH REFERENCE TO 'JUDICIAL DEFERENCE' VIS-À-VIS 'MANIFEST ARBITRARINESS'

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*In Indian constitutional courts' murky jurisprudence in conducting judicial review, two doctrines antithetical to each other emerge — judicial deference, where the Court defers to the legislature on matters beyond its purported expertise, and manifest arbitrariness, where the Court outrightly declares legislative acts as unconstitutional to the principle of equality. The theoretical periphery of where the two doctrines apply or not has recently warranted an awkward answer. Their inherently vague nature is potent to confuse jurisprudence over when judicial review should be exercised or refrained from. In this paper, the authors contend that the application of these doctrines by Indian constitutional courts has defied consistency, where the diametrically opposite tests are being applied in similar factual matrices. This is demonstrated through the arising dichotomy among recent yet prominent case laws of the Supreme Court. This makes it imperative to harmonise the application of both doctrines to culminate in a consistent approach to conducting judicial review. The paper intends to resolve this conundrum by proposing a consistent theory of judicial review which would resolve the application of both doctrines. It builds on Dixon's Responsive Judicial Review alongside other concomitant models to conclude that the present literature originates from a Global North constitutionalist perspective, requiring courts to conduct the exercise as a response to protecting democracy. However, given the nature of complexities faced by Global South constitutional democracies like India, resolving them requires the courts to not just be democratically responsive but also respond by protecting larger constitutional commitments as a whole. This can only occur by reimagining the contours of judicial review through the application of remedies. Thus, while judicial deference should be retained, it should give way to ensuring enforcement of constitutional values. This can be done by applying weak strong remedies in Indian constitutional matters, such that the balance between the two doctrines is maintained. One such remedy the paper proposes is a Suspended Finding of Unconstitutionality, which entails temporarily suspending the Court's finding of unconstitutionality of a legislative act until the legislature remedies such unconstitutionality within a stipulated period.*

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## I. INTRODUCTION

The Supreme Court of India ('SCI') has exhibited varying behaviour in its manner of dealing with constitutionally significant matters, ranging from a pure textualist approach to a subsequent living tree constitutionalist one.[1] Likewise, authors like Chintan Chandrachud have hinted towards the Court's interpretive tactics of "panchayati eclecticism", where the courts adopt a result-oriented approach in matters, producing incoherent jurisprudence void of established interpretive mechanisms.[2] Similar concerns have also been raised in recent times *vis-à-vis* dealing with the extent of powers to judicially review state action, characterised by courts taking opposing stances in factually similar situations.[3] For instance, issues over employing eclectic tactics were flagged when the SCI in *Supriyo* v. *Union of India* remained silent on the right of homosexual couples to marry in 2023, even as the same Court in *Navtej Singh Johar* v. *Union of India* had granted them the right to intercourse in 2015, less than a decade before this judgment.[4] Despite the recognition of such trends, the discourse has avoided inquiring into the root of this issue, least of all its reconciliation.[5] The issue over the Court's extent of powers of judicial review is not new to the constitutional discourse.[6] However, such a dichotomy indicates that the same remains unexplored by Indian courts, yielding confusing results.

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[1] *See* Chief Election Commissioner v. Jan Chaukidar, (2013) 7 SCC 507, ¶7 ('Jan Chaukidar'); Lily Thomas v. Union of India, (2013) 7 SCC 653, ¶¶22, 32, 33 ('Lily Thomas'); People's Union for Civil Liberties v. Union of India (2013) 10 SCC 1, ¶¶57,58 ('PUCL') (These case laws indicate the eclecticism that ails the Supreme Court. As Chintan Chandrachud identifies, the first case held that franchise can be denied to a large section of the society (herein, prisoners), the second case held that disqualifications can be imposed liberally but must be uniform, yet the last case law holds that those who have the right to vote must be able to cast an anonymous negative vote against all candidates).

[2] Chintan Chandrachud, *Constitutional Interpretation* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, (Oxford University Press, 2016).

[3] Srishti Jaswal, *India's LGBTQ Community Battles Same-Sex Marriage 'heartbreak' From Court*, AL JAZEERA, October 24, 2023, available at https://www.aljazeera.com/news/2023/10/24/india-lgbtq-supreme-court-same-sex-marriage-rights (Last visited on July 4, 2025).

[4] *Id*.

[5] *See infra* Part III on "Inconsistent Reasonings for Inconsistent Decisions: Fallacies in the Application of Judicial Deference and Manifest Arbitrariness".

[6] *See generally* Mark Tushnet & Bojan Bugaric, POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM, 5 (Oxford University Press, 2021); Ronald Dworkin, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION, 74 (Harvard University Press, 1996); Jeremy Waldron, *The Core of the Case Against Judicial Review*, Vol. 115(6), YALE L. J., 1346, 1360 (2005).

If one conducts such an inquiry in the Indian context, one would notice the emergence and application (though ironic) of two polar-opposite principles — judicial deference and manifest arbitrariness. The former, deriving its basis from the Montesquieuan understanding of separation of powers,[7] stands for courts declining to conduct judicial review of matters placed before it, by virtue of it falling within the State's domain and thereby, 'deferring' to their competence on dealing with it.[8] Contradictorily, manifest arbitrariness, as several have discussed previously,[9] serves to represent the Court's activist stance by reviewing State action in the form of plenary legislation when concerns over its reasonability are raised.[10] Although manifest arbitrariness is a standard of review used to demonstrate a violation of the right to equality, it has impacted the jurisprudence of judicial review in ways that extend beyond Article 14's contours.[11] The doctrine has been used by the Court to strike down laws on the grounds of unreasonableness by virtue of the unconstitutional 'ostensible' effect created by such legislations.[12] However, delving into inquiries over the same has also been argued as forgetting the Court's limits to not delve into matters of policy and enter the legislative domain.[13] Any inquiry into the same would exceed the Court's jurisdiction over matters it lacks expertise, necessitating the Court to exercise deference. This has imputed a fluid understanding of separation of powers in contemporary constitutional jurisprudence, impacting the adjudication of constitutional matters extending beyond the equality paradigm.[14] Hence, given their inherently dichotomous nature, one seeks to understand how the two doctrines operate in harmony within the same constitutional time and space.

As mentioned above, the lack of jurisprudential and scholarly opinion on the stifling of eclecticism exacerbates the issue by allowing contemporary constitutional issues to become a playground in the hands of such opposing doctrines.[15] This is illustrated in the above example, where the ambivalence of the two doctrines gets displayed in the inconsistency surrounding the

[7] Montesquieu, DE L'ESPRIT DES LOIS (1748).
[8] T.R.S. Allan, *Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory*, Vol. 127, L.Q. REV., 96 (2011).
[9] *See* Vanshaj Jain, *Symposium- Interpreting Equality Rights in India's Constitution: The Manifest Arbitrariness Test*, IACL-AIDC BLOG, September 17, 2018, available at https://blog-iacl-aidc.org/blog/2018/9/17/symposium-interpreting-equality-rights-in-indias-constitution-the-manifest-arbitrariness-test (Last visited on January 4, 2026); Akshay Sriram, *Navigating Temporality within Manifest Arbitrariness- Unpacking the Contentious Nature of the Dissent In re: Section 6A of the Citizenship Act, 1955*, CONSTITUTIONAL LAW & PHILOSOPHY BLOG, January 4, 2024, available at https://indconlawphil.wordpress.com/2024/12/04/guest-post-navigating-temporality-within-manifest-arbitrariness-unpacking-the-contentious-nature-of-the-dissent-in-in-re-section-6a-of-the-citizenship-act-1955/ (Last visited on January 4, 2026).
[10] Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶¶101–104 ('Shayara Bano').
[11] *See generally* State of West Bengal. v. Anwar Ali Sarkar, (1952) 1 SCC 1; E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3 ('EP Royappa'); *Id*. (Equality has evolved over time from the doctrine of reasonable classification — where a law was struck down if it failed to show a clear, intelligible differentia with a rational nexus; to arbitrariness — for striking down executive orders on account of their unreasonable nature; to manifest arbitrariness — where the same principle was extended to legislation).
[12] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 1, ¶200.1 (per Chandrachud J.) ('Electoral Bond').
[13] *See infra* notes 19, 70; For further discussion on the same, *see supra* Part III on "Inconsistent Reasonings for Inconsistent Decisions: Fallacies in the Application of Judicial Deference and Manifest Arbitrariness".
[14] The assertion is particularly depicted in the discussion of application of the 'new' equality approach and its inconsistencies with the understanding of rule of law. For discussion on the same, *see generally* Tarunabh Khaitan, *Equality* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, (Oxford University Press, 1st edn., 2016).
[15] Jan Chaukidar, *supra* note 1, ¶7; Lily Thomas, *supra* note 1, ¶¶22, 32, 33; PUCL, *supra* note 1, ¶¶57, 58.

rights of same-sex couples.[16] Hence, the creation of such a trend requires not only the need to propose certain contours in which these doctrines must operate but also the need to resolve the larger issue of preventing panchayati eclecticism. This can be achieved through a model of judicial review which creates consistency in the exercise. In this paper, the authors endeavour to take up this inquiry by proposing contours to judicial review in the light of the two existing doctrines.

The paper identifies the ubiquity of this dilemma in contemporary jurisprudence. It highlights the importance and necessity of each doctrine in such jurisprudence, necessitating their harmonious and co-existent operation as opposed to preferring one over the other. Building on this and borrowing from comparative scholars and jurisprudence, it seeks to cater to the Indian jurisdiction by proposing a paradigm to resolve the issues identified, going beyond the dominant epistemes of judicial review's contours proposed in Global North democracies.[17] This allows the contours of judicial review to be defined to suit Indian, and inevitably, the needs of Global South constitutionalism, instead of leaving decisions on constitutionally significant matters to a judge's fancies of applicable doctrines.[18] With this, the paper seeks to serve an impact that would serve as an illustration to, and in result, inspire Global South democracies which face similar issues like India, to adopt their own dynamic approach in constitutional adjudication rather than sticking to age-old doctrines, in a bid to resolve the dilemma of panchayati eclecticism arising herein.

In Part II, the authors provide background to the two doctrines, explicating their vague and incoherent nature in the Indian constitutional scheme. Part III highlights the ubiquity of this dilemma in contemporary jurisprudence by shedding light on certain cases with factually similar scenarios, yet differing results.[19] Terming these as 'conflicts', the authors demonstrate the two doctrines' role in creating ambiguity in the contours of review. In this Part, the authors also address the unviability of reconciling the two doctrines. Based on this, Part IV discusses solutions to the existing problem by proposing contours to judicial review by analysing Rosalind Dixon's, thereafter Dixon, theory of Responsive Judicial Review in the Indian context.[20] Part V proceeds to present a remedy called a Suspended Finding of Unconstitutionality ('SFU') that aligns with the judicial review presented in the preceding part. Part VI applies this newly formulated model to the conflicts identified in Part III, showcasing their resolution. Part VII concludes.

## II. BACKGROUND

The authors contextualise their argument by laying down the development of manifest arbitrariness and judicial deference across time in Indian constitutional jurisprudence, and the subsequent issue of contradiction between the two. The fundamental dichotomy between

[16] Hari Kartik Ramesh, *The Equal Marriage Case and a Suspended Declaration of Invalidity*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 4, 2023, available at https://indconlawphil.wordpress.com/2023/05/04/guest-post-the-equal-marriage-case-and-a-suspended-declaration-of-invalidity/ (Last visited on December 27, 2025).

[17] David Landau, *A Dynamic Theory of Judicial Role*, Vol. 55, B.C. L. REV., 1501, 1503 (2014).

[18] *Id*.

[19] Jaya Thakur v. Union of India, (2024) 9 SCC 538, ¶10 ('Jaya Thakur'); Supriyo v. Union of India, 2023 SCC OnLine SC 1348, ¶165 ('Supriyo'); Electoral Bonds, *supra* note 12, ¶309.

[20] Rosalind Dixon, RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE, (Oxford University Press, 2023); Minister of Home Affairs v. Fourie and Anr., 2006 (1) SA 524 (CC) (Constitutional Court of South Africa) ('Fourie').

the doctrines gets clearly displayed here, paving the way for understanding the conflicts that have arisen recently.

### *A. MANIFEST ARBITRARINESS*

The doctrine of arbitrariness is not a recent phenomenon, as it has been used to address arbitrary executive actions for decades, marking its genesis in Justice Bhagwati's judgment in *E.P. Royappa* v. *State of Tamil Nadu*.[21] This doctrine was, and still is, heavily criticised by eminent scholars like H. M. Seervai,[22] M.P. Singh,[23] Tarunabh Khaitan,[24] and Arun Shourie,[25] who have termed it as "extra-constitutional" because the doctrine was never intended by the framers of the Constitution, and they believed that the SCI was stretching beyond the powers the Constitution grants.[26] It was even argued that this doctrine was "unnecessary" and the same results could also be obtained via the application of the reasonable classification doctrine.[27] The increased use of this doctrine led to a shift in focus to its vagueness as scholars tried to come up with a standard for its use. Abhinav Chandrachud, while conceding that the doctrine is "extra-constitutional", argued in favour of its application to test plenary legislation while keeping the basic structure test as a standard for its application.[28] This position, however, was criticised, since accepting the doctrine would virtually replace and redefine the right to equality as a new right itself.[29] Moreover, it was argued that the application of the doctrine of reasonable classification would yield the same result as the doctrine of manifest arbitrariness.[30]

However, whether this doctrine could be used to strike down plenary legislation was a question that remained contentious, owing to the judiciary taking different stances in different cases.[31] Putting an end to this uncertainty, the SCI in *Shayara Bano* v. *Union of India*

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[21] E.P. Royappa, *supra* note 11, ¶85.

[22] H. M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. 1, 448 (Universal Law Publishing, 4th edn., 2009) (The author argues that if the mandate prescribed by a fundamental right is violated, the law will be void, however laudable the motives of its makers; but if the mandate has not been so violated, the utmost malignity will not make it void. This argument is taken a step further in this comment, as it is suggested that even when the mandate prescribed by a fundamental right is violated, there will be a presumption that the motives of the lawmakers were laudable, since their motives are of no consequence in statutory invalidation).

[23] M. P. Singh, *The Constitutional Principle of Reasonableness*, Vol. 3, S.C.C. JOUR. 31 (1987).

[24] Khaitan, *supra* note 14, 712–719.

[25] Arun Shourie, COURTS AND THEIR JUDGMENTS, 402 (Rupa & Co., 2001).

[26] *Id*.

[27] Deepika Sharma & Radhika Gupta, *Doctrine of Arbitrariness and Legislative Action: A Misconceived Application*, Vol. 5(2), NALSAR STUDENT L. REV., 30 (2009); Shankar Narayanan, *Rethinking "Non-Arbitrariness"*, Vol. 4, NLUD STUDENT L. J., 136–141 (2017).

[28] Abhinav Chandrachud, *How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of Mardia Chemicals v. Union of India*, Vol. 2, INDIAN J. CONST. L., 179, 189 (2008) ("While the basic structure test is applied only against amendments of the Constitution and not in the testing of ordinary legislation…. the basic structure test may be used as an objective standard in ascertaining the arbitrariness or otherwise of legislation.").

[29] Sharma & Gupta, *supra* note 27, 26.

[30] *Id*., 29.

[31] State of Andhra Pradesh v. McDowell, (1996) 3 SCC 709 ('McDowell'); State of Bihar v. Bihar Distillery, (1997) 2 SCC 453, ¶22; State of Madhya Pradesh v. Rakesh Kohli, (2012) 6 SCC 312, ¶¶17–19; Rajbala v. State of Haryana, (2016) 2 SCC 445, ¶¶60–65.

('Shayara Bano') overruled the *State of Andhra Pradesh*. v. *McDowell*[32] and upheld the use of arbitrariness to strike down plenary legislation.[33] This new development, taking the form of 'manifest arbitrariness', rendered every single piece of legislation susceptible to challenge under it. The same has been used in many contemporary cases like *Navtej Singh Johar* v. *Union of India*, *Joseph Shine* v. *Union of India,* and most recently the case of *Association for Democratic Reforms* v. *Union of India* ('Electoral Bonds').[34] However, the doctrine's application as a legislative review has been severely criticised.[35] The criticism that the doctrine of arbitrariness is often invoked in cases where the same outcome could have been reached through existing legal provisions has also been reiterated in the context of its application to plenary legislation.[36] This doctrine has also been criticised for being applied entirely at the discretion of the SCI and having no uniformity in its implementation.[37] Furthermore, it has been argued that this doctrine broadens the ambit of Article 14 review of plenary legislation from beyond just a comparative review.[38]

In its attempt to give a standard to this doctrine, the Court has stated that it applies to an act of the legislature done "capriciously, irrationally and/or without adequate determining principle".[39] It was further noted that excessive or disproportionate legislation would be manifestly arbitrary.[40] However, what counts as 'excessive or disproportionate' has never been adequately explained and remains vague. Because of such vagueness, the courts have had to interpret it in their own ways, each raising more questions than they answer. For instance, in Electoral Bonds, the Court applied manifest arbitrariness on the ground that the scheme hinders the process of free and fair elections and thus is against constitutional values.[41] On the other hand, the Court did not apply the doctrine and overrule the Election Commissioner's Act, despite it being entirely possible to use a similar reasoning.[42] Thus, the meaning of 'constitutional values' remains unclear, particularly concerning the application of the doctrine of manifest arbitrariness in cases involving free and fair elections, especially considering that the doctrine is traditionally used to examine issues under Article 14, which guarantees the right to equality.[43]

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[32] *Id*. (In McDowell, the Court had expressly rejected the notion that the doctrine of arbitrariness could be used to strike down plenary legislation. All the subsequent judgments which employed the same position used McDowell as their primary authority).
[33] Shayara Bano, *supra* note 10, ¶383.
[34] Electoral Bonds, *supra* note 12.
[35] Lalit Panda, *Rationality by Any Other Name: Common Principles for an Evolving Equality Code*, Vol. 10, INDIAN J. CONST. L., 215 (2023); *see infra* note 36–38.
[36] Khaitan, *supra* note 11; Dhruva Gandhi, *Rethinking "Manifest Arbitrariness" in Article 14: Part II – Disparate Impact and Indirect Discrimination*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 21, 2020, available at https://indconlawphil.wordpress.com/2020/05/21/guest-post-rethinking-manifest-arbitrariness-in-article-14-part-ii-disparate-impact-and-indirecinumt-discrimination/ (Last visited on December 27, 2025).
[37] Kieran Corriea, *The Supreme Court's Electoral Bonds Judgement- II: The Arbitrariness of Manifest Arbitrariness*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY, February 28, 2024, available at https://indconlawphil.wordpress.com/2024/02/28/the-supreme-courts-electoral-bonds-judgment-ii-the-arbitrariness-of-manifest-arbitrariness-guest-post/ (Last visited on December 27, 2025).
[38] *Id*.
[39] Shayara Bano, *supra* note 10, ¶101.
[40] *Id*., ¶45.
[41] Electoral Bonds, *supra* note 12.
[42] More such scenarios are discussed in Part III of this Paper, *see infra* Part III.C on "The Paradox of Free and Fair Elections".
[43] The Constitution of India, 1950, Art. 14.

Attempts have been made to make sense of the doctrine. In his paper, Vasu Aggarwal tries to find a pattern in judgments in which the doctrine has been used and comes up with a test to determine the conditions required to adjudicate on any legislation.[44] To segregate legislations in which the doctrine can be employed and those in which it cannot, he mandates the existence of the legislation as a 'rule' rather than a 'standard'.[45] To him, manifest arbitrariness applies in the context of *ex-ante* rules set up by the legislature before the manifest arbitrariness scrutiny is conducted (generally in the form of legislation), as opposed to *ex-post* standards created by the judiciary through interpretation of those rules.[46] For instance, a rule might specify a fixed penalty for a defined act (e.g., discharging chemical Z into a river). In contrast, a standard might require that conduct be 'reasonable' or 'in the public interest', leaving its content to be determined by courts during adjudication. This distinction ensures the manifest arbitrariness doctrine acts as a targeted check only on rigid, predetermined legislative rules that risk producing unfair results, while standards retain their flexibility for courts to fill in over time.[47] However, as several scholars have argued, the doctrine of manifest arbitrariness has no clearly defined boundaries.[48] Therefore, just because the SCI has not yet applied it to a 'standard' does not mean such an application is outside its scope. In cases such as Shayara Bano, since the factor of the existence of a rule was not the focal point of emphasis when doctrine was laid down, but dealt more with a legislation's *ex facie* unreasonability, it could subsequently translate to the doctrine being applied to actions existing beyond a postulated 'rule'. Hence, the authors argue that Aggarwal's conception could be a restrictive understanding of the doctrine than the purpose it is meant to serve. The analysis undertaken by the authors in Part III would further establish that this test still entails gaps within its interpretation of the doctrine.

### *B. JUDICIAL DEFERENCE*

At the end of the arbitrariness spectrum lies the revered doctrine of judicial deference. Courts have repeatedly refrained from adjudicating on matters concerning legislation because it fell outside their purview and they would not encroach on the territory of the legislature.[49] Judicial deference is an essential feature of any legal system, as it prevents judges from employing their ideological, political, or other forms of bias while ruling.[50] Furthermore, it is necessary to maintain the separation of powers between the executive, legislative and judiciary

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[44] Vasu Aggarwal, *Manifesting the Consistency in the Application of 'Manifest Arbitrariness Doctrine'*, Vol. 44(1), STATUTE LAW REV., 1 (2021).
[45] *Id*., 6.
[46] *Id*.
[47] *Id*.
[48] Dhruva Gandhi, *Rethinking "Manifest Arbitrariness" in Article 14: Part I – Introducing the Argument*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 6, 2020, available at https://indconlawphil.wordpress.com/2020/05/06/rethinking-manifest-arbitrariness-in-article-14-part-i-introducing-the-argument/comment-page-1/ (Last visited on January 4, 2025); Jain, *supra* note 9; Gautam Bhatia, *Equal Moral Membership: Naz Foundation and the Refashioning of Equality*, SSRN (2017) available at https://ssrn.com/abstract=2980862 (Last visited on December 27, 2025); Abhinav Chandrachud, DUE PROCESS OF LAW, 186 (Eastern Book Company, 2011).
[49] Malavika Parthasarathy, *SC Judgment Review 2021: Judicial Deference*, SUPREME COURT OBSERVER, December 28, 2021, available at https://www.scobserver.in/journal/sc-judgment-review-2021-judicial-deference-rajeev-suri-central-vista/ (Last visited on January 4, 2026).
[50] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, Vol. 73(3), U. CHI. L. REV., 823 (2006); Gregory Shaffer, *Comparative Institutional Analysis and a New Legal Realism*, Vol. 2013(2), WIS. L. REV., 607 (2013).

and prevent unnecessary judicial activism.[51] While this jurisprudence in the Indian context is extremely muddled, considering India's vast scope of judicial review,[52] courts routinely exercise this right.

Judicial deference as a concept emerged in the United States ('US') when it was an English colony, and the legislature was considered the supreme authority to interpret the Constitution.[53] After its independence, and much debate, the rights came to be seen as expressions of people's wills, which justified judicial review to ensure legislative adherence to the constitution.[54] However, scholars warned against excessive use of judicial review. James B. Thayer advocated for judicial deference to legislatures, arguing that courts should uphold legislation unless there was no "reasonable doubt" that it was unconstitutional.[55] Holmes supported deference to legislatures based on the idea that law should reflect the will of the dominant forces in society.[56] Brandeis advocated for a more nuanced approach to deference that considered the social and economic realities underlying legislation.[57]

Justice K.K. Mathew has described the 'doctrine of political question' as an expression of the classical idea of separation of powers, where certain determinations made by the legislature or executive are considered non-justiciable, even if they involve constitutional issues.[58] In India, however, judicial responses to such questions have been inconsistent.[59] Although there is no clear judicial position on the applicability of the political question doctrine, the prevailing view suggests that it has limited relevance in the Indian context, given the system of checks and balances rather than a strict separation of powers.[60] Nevertheless, there is a need to delineate the boundaries within which the judiciary can operate, ensuring it adheres to the principle of checks and balances while avoiding an overreach of its mandate.

Since it is not just the Indian Courts that deal with the question of where judicial deference should/should not be resorted to, foreign jurisprudence could also be mulled upon to define the boundaries of this judicial deference.[61] This is also because judicial deference in India, driven by the principle of separation of powers, vaguely resembles the doctrine of political

[51] The Constitution of India, 1950, Art. 50; *See* Ram Jawaya Kapur v. State of Punjab, (1955) 1 SCC 553, ¶¶14–15; BALCO Employees' Union (Regd.) v. Union of India, (2002) 2 SCC 333, ¶97.
[52] The Constitution of India, 1950, Art. 13(2).
[53] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, Vol. 7(3), HARV. L. REV., 129 (1893).
[54] *Id*.
[55] *Id*.
[56] Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, Vol. 130(9), HARV. L. REV., 2352 (2017); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, Vol. 44(3), DUKE L.J., 452 (1995).
[57] *Id*., 2354.
[58] K.K. Mathew, *The Dilemma of the President and Justiciability of a Verdict on Impeachment*, Vol. 1, S.C.C.J., 6 (1978).
[59] N.L. Rajah, *The Conundrum of a "Political Question"*, BAR AND BENCH, April 25, 2020, available at https://www.barandbench.com/columns/litigation-columns/the-conundrum-of-a-political-question (Last visited on January 4, 2026).
[60] Rahul Unnikrishnan & Velpula Audityaa, *The Political Question Doctrine and Justiciability of Seemingly Political Matters*, BAR AND BENCH, May 15, 2020, available at https://www.barandbench.com/columns/the-political-question-doctrine-and-justiciability-of-seemingly-political-matters (Last visited on January 4, 2026).
[61] John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard University Press, 1980).

question as it exists in the US.[62] However, in India, there has been no systematic or well-defined effort to clearly outline these boundaries.[63] For instance, the case of *Indra Sawhney* v. *Union of India* ('Indra Sawhney') dealt with the issue of judicial deference as a political question.[64] The Court held that simply because certain questions have a political tinge to them does not always lead to the court refusing to exercise its power.[65] However, the extent to which such a political tinge can exist where the Court can conduct judicial review, or in other words, the extent of political tinge beyond which the court must defer to the legislature, remains unspecified. Moreover, the judiciary has on several occasions refused to consider matters that, in its opinion, were not suitable for judicial review.[66]

Nevertheless, as would be proved by the authors, there is no consistency when using judicial deference, and there is a *prima facie* discrepancy between the cases in which the same has been used and those in which it potentially could have been used. Thus, questions remained unanswered regarding the extent of such deference, which the courts can use as a ground to abdicate their responsibility of adjudication. This discrepancy is further worsened by the wide ambit of the doctrine of manifest arbitrariness, which has blurred the idea of the judiciary not being able to deal with matters concerning plenary legislation, as it allows a review of legislation based on vague ideas like arbitrariness, irrationality, etc. Thus, harmonising these two becomes very important because of the potentially vast implications on India's overall contours of judicial review.

## III. INCONSISTENT REASONINGS FOR INCONSISTENT DECISIONS: FALLACIES IN THE APPLICATION OF JUDICIAL DEFERENCE AND MANIFEST ARBITRARINESS

Having highlighted the inconsistency in manifest arbitrariness' application, and the doctrine of judicial deference operating as a disjunct phenomenon, the two approaches could significantly clash with each other where each is applied in opposition to the other under the ambit of judicial review. In the absence of settled standards for conducting judicial review of State action, both legislative and executive, the authors highlight how courts such as the SCI have created confusion in the parameters of such exercise, largely attributable to the clash between the two doctrines.

The authors argue that courts have sought to apply these two polar opposite standards in cases involving similar factual situations. Hence, this Part aims to identify significant constitutional cases in contemporary jurisprudence and to underline a conflict between them, despite having coterminous issues to resolve. However, upon undertaking this exercise, readers may notice certain differences among the facts or circumstances of these supposedly conflicting

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[62] Baker v. Carr, 369 U.S. 186 (1962) (United States Supreme Court); Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, Vol. 1993, SUP. CT. REV., 125, 135 (1993); Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, Vol. 81(2), CORNELL L. REV., 393, 497 (1996).

[63] For a detailed exemplification of this contention, *see infra* Part III on "Inconsistent Reasonings for Inconsistent Decisions: Fallacies in the Application of Judicial Deference and Manifest Arbitrariness".

[64] Indra Sawhney v. Union of India, (1992) Supp 3 SCC 217 ('Indra Sawhney').

[65] *Id.*, ¶¶396, 557.

[66] *See infra*, Part III on "Inconsistent Reasonings for Inconsistent Decisions: Fallacies in the Application of Judicial Deference and Manifest Arbitrariness".

cases. This might be a reason for the reader to justify an application of different doctrines for each of these cases, thereby nullifying the authors' argument.

Pre-empting these reasons as counter-arguments, the authors, in an attempt to rebut such an exercise's conclusions, argue that despite heavy reconciliation and differentiation in conflictual scenarios, the method of resolution undertaken is untenable. The point of reconciliation identified, henceforth, is not only inadequate to fulfill its purpose, but also inevitably raises further questions that would merit clarification. This portion would explicate the authors' hypothesis by demonstrating judicial polyvocality, the non-resolution of which could be potentially harmful and create several significant issues for the Indian constitutional polity.

### *A. TO DO OR NOT TO DO: ASSESSING THE ARBITRARINESS OF ECONOMIC LEGISLATIONS*

The Electoral Bonds case is a recent and significant example of the Court's application of the doctrine of manifest arbitrariness.[67] Several restrictions on companies to contribute to political parties were removed, via amendments in economic legislation, alongside the disclosure requirements of revealing the details of such contributions.[68] The underlying reasoning was to treat individuals and companies equally when it came to funding political parties. This created adequate space for electoral bonds to acquire the cynosure of party funding, which acted as financial instruments to fulfil the purpose of said contribution. The practical effect of such amendments and schemes was considered to be the creation of shell companies made for such purpose, potentially opening avenues of money laundering and unaccounted transactions in the electoral funding dynamics.[69] The Court held that unlimited contributions towards political parties are "antithetical to free and fair elections" because they would lead to people with vested interests having an indirect say in policy-making, thereby creating *quid pro quo* arrangements.[70] Consequently, Chandrachud J., while holding the scheme as manifestly arbitrary, concluded that the amendments to the extent of the changes attracted said doctrine since they impacted constitutional values crucial to a democratic polity, especially at a time when general elections were nearing.[71]

When the question of the extent of judicial review came up *vis-à-vis* such legislation, the Union Government, citing *R.K. Garg* v. *Union of India* ('R.K. Garg'), argued that the electoral bonds and the amendments related to them were matters concerning the economic policy and legislation, thereby acquiring a presumption of constitutionality.[72] Since it fell within the State's executive and legislative domain, the judiciary should exercise restraint while ruling on the same.[73] In R.K. Garg, Bhagwati J. relied on American jurisprudence on judicial deference in policy matters to argue a similar approach in the Indian context.[74] This is done assuming that such understandings of separation of powers *vis-à-vis* economic legislation acquire the same fora as they do in the US. However, in Electoral Bonds, the Court refused to rely on the *ipse dixit* of the

[67] Electoral Bonds, *supra* note 12, ¶215.
[68] *Id*., ¶¶1–10.
[69] *Id*., ¶¶20–24.
[70] *Id*., ¶216.
[71] *Id*., ¶¶215, 221.
[72] R.K Garg v. Union of India, (1981) 4 SCC 675, ¶¶8, 16 ('R.K. Garg').
[73] *Id*., ¶16.
[74] *Id*., ¶8.

government with respect to its given context. It held that the scheme, while an economic policy to a certain extent, concerned the broader questions of free and fair elections in the Indian democracy. Hence, shying away from adjudicating on the same would violate the constitutional values enshrined in the Indian Constitution.[75] Thus, while the Court did not reject the doctrine of presumption of constitutionality altogether, it held that the gravity of the matter prevented it from relying solely on the government's observations. This led the Court to extend the application of the manifest arbitrariness doctrine on the aforesaid matter. Thus, the Court sought to distinguish its judgment from the typical deferential attitude undertaken while dealing with economic legislation, citing the effect of this case on 'civil and political rights'.[76]

Since the question of R.K. Garg arises and is subsequently rejected by the Court, it must be analysed against the Electoral Bonds case and how similar/distinct it was to the former, for a different approach to be undertaken. Much like Electoral Bonds, R.K. Garg was concerned with the constitutional validity of the Special Bearer Bonds Act, 1981, a financial instrument, on grounds of violating Article 14.[77] The Act was essentially a black-to-white money conversion scheme, which provided people who bought these bonds with immunity from investigation or prosecution regarding the source of their funds, thereby guaranteeing anonymity.[78] Furthermore, it is comparable to Electoral Bonds in the way that the scheme sought to decrease accountability from a class of people that would have been liable otherwise — in this case, tax evaders.[79] The petitioners claimed that this law rewarded tax evaders while unfairly discriminating against law-abiding taxpayers, creating equality concerns.[80] Hence, it attracted similar concerns as the Electoral Bonds case on factors of economic legislations bypassing transparency requirements while detrimentally impacting the general populace's rights (Electoral Bonds was argued as violative of the public's right to information, whereas R.K. Garg was violative of equality). Despite dealing with economic legislation that provided blanket immunity from restrictions, the Court refused to intervene. It held that it should not interfere in matters of economic policies unless they are "palpably arbitrary".[81]

When manifest arbitrariness did not exist as an established doctrine similar to current jurisprudence, the Court acknowledged that specific provisions of a statute could violate Article 14 if they were arbitrary and irrational in the context of all the facts of the case.[82] Furthermore, certain corollaries were at the cynosure.[83] For instance, the court in *Mithu Singh* v. *State of Punjab* had struck down the constitutionality of a penal code provision on the grounds of arbitrariness and substantive due process (akin to manifest arbitrariness as discussed in Part II).[84] Hence, there existed a precedent for such judgments at the time of R.K. Garg, preventing such standards from being considered alien to their context.

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[75] Electoral Bonds, *supra* note 16, ¶¶41–43, 209, 215, 221.
[76] *Id*.
[77] *Id*., ¶¶40, 41, 243.
[78] Special Bearer Bonds (Immunities and Exceptions) Act, 1981, §§3, 4.
[79] R.K. Garg, *supra* note 72, ¶28 (per Gupta J.).
[80] *Id*., ¶30 (per Bhagwati J.)
[81] *Id*., ¶19.
[82] *Id*., ¶¶18, 19.
[83] Bachan Singh v. State of Punjab, (1980) 2 SCC 397, ¶76; Maneka Gandhi v. Union of India, (1978) 1 SCC 248, ¶3 (per Bhagwati J.); Sunil Batra v. Delhi Administration and Ors., (1978) 4 SCC 494, ¶¶226–228; Prem Shankar Shukla v. Delhi Administration., (1980) 3 SCC 526, ¶31.
[84] Mithu v. State of Punjab, (1983) 2 SCC 277, ¶23.

Despite such acknowledgement, the Court sought to apply the constitutionality presumption, holding it as a matter of economic policy to be left to the State's wisdom.[85] Despite the arbitrary divide between tax evaders and taxpayers, the ambivalence of standards resorted to is readily apparent in the Court's reasoning.[86] Furthermore, black money was viewed in a very restricted context and not in a broader picture of its effects on the country's overall economy. In the end, however, the Court deferred from imposing its decision on the economic policy of the government.

Despite several contextual and factual similarities in the two cases, alongside recognising the arbitrariness standard, the Court's treatment of judicial review diverged significantly between the two cases. This divergence raises essential questions about constitutional evaluation of economic legislation, as in both cases, the policies directly impacted the fundamental rights. However, a slight distinction could be brought to justify these conclusions.

Similarly, it can be argued that R.K. Garg continues to hold water and would not be overruled by the Electoral Bonds case.[87] This means that if it were to be decided around the time of the latter, it would hold ground as a good law due to the difference in realities in which the two judgments are set. While R.K. Garg is set around the issue of tax evaders receiving escape routes,[88] Electoral Bonds was in the context of contributions to political parties, attracting 'potentially larger' issues of democracy and free and fair elections.[89] Hence, since Chandrachud J. unequivocally differentiated the inapplicability of manifest arbitrariness to economic legislations from those that, despite being economic, impact constitutional values like the integrity of the electoral process, the two cases could be differentiated *vis-à-vis* the standards of review applied in each situation.[90] Hence, the threshold of deference versus manifest arbitrariness in economic legislation is found to be situated in the notion of constitutional values.[91]

However, this reconciliation would bring several issues, implicating its ineffective nature. Firstly, there exists no objective threshold as to what is considered a "constitutional value".[92] Secondly, since it is an established rule of any democratic polity that ordinary legislation must derive its validity from the constitution and be reflective of its ideals, how would one separate constitutional values espoused in legislation from other values envisaged? The authors argue that R.K. Garg could also be reflective of such ideals that attract a constitutional colour, thereby potentially attracting manifest arbitrariness as an applicable standard — then why must it stand differentiated?

In R.K. Garg, the petitioners argued that the bearer bonds were violative of equality rights.[93] Since tax evaders were provided a beneficial regime to remain immune from penalties, the legislation impermissibly differentiated them from honest taxpayers who had been deterred by and were operating under the threat of such punitive methods.[94] Hence, issues surrounding equality

[85] R.K. Garg, *supra* note 72, ¶¶7, 8 (per Bhagwati J.).
[86] *Id*., ¶19.
[87] Electoral Bonds, *supra* note 12, ¶222.1.
[88] RK Garg, *supra* note 72, ¶30.
[89] Electoral Bonds, *supra* note 12, ¶¶209, 210.
[90] *Id*., ¶215.
[91] *Id*.
[92] Corriea, *supra* note 37.
[93] RK Garg, *supra* note 72, ¶30.
[94] *Id*.

were considered before pronouncing the judgment.[95] Based on this supposed threshold, why would R.K. Garg not attract manifest arbitrariness? Is equality not a constitutional value for bearer bonds to receive the doctrine's scrutiny? Such facets of the case decrease the tenability of the standard for reviewing economic legislation, indicating murky trajectories in this regard.

Furthermore, it must be considered that in cases involving economic legislation, judicial deference has not prevented courts from applying constitutional commitments as and when necessary. Rather, Nariman J. has previously held that, despite the Court being required to take a deferential attitude, it must protect constitutional commitments from economic legislation where manifest arbitrariness could potentially be attracted.[96] On these grounds, the Court in Electoral Bonds unequivocally held that judicial deference cannot be applied in a straightjacketed manner, and manifest arbitrariness must be applied in legislations that purport an ostensible purpose in conflict with a real purpose.[97] When compared to the bearer bonds legislation in R.K. Garg, one finds that despite the 'ostensible purpose' being of incentivising tax evaders to legitimise their finances, it was noted that the real purpose involved much more significant concerns of black money being turned white, deeming it to be threatening to the national economy.[98] Additionally, this factor gains contemporary relevance in light of judgments considering black money as a threat to national security.[99] Considering such threats are held by the apex court as a constitutionally significant matter, the doctrine should be applied to the case. Yet, the difference in standards applied to each case holds ground under the present position of law, despite proving the constitutional value threshold as untenable.

### *B. UNDESIRABLE JUDGMENTS OVER UNDESIRABLE LAWS: AN ECLECTIC APPROACH TO GENDER EQUALITY*

The origins of manifest arbitrariness lie in landmark cases of the previous decade that shaped the present decade's jurisprudence. In Shayara Bano, the constitutionality of Triple Talaq as an irrevocable and arbitrary form of divorce against Muslim women was a concern.[100] Similar considerations arose in *Joseph Shine* v. *Union of India*[101] while assessing the impact of §497 of the Indian Penal Code, 1861 ('IPC') on women. Such issues of gender-based discrimination were also resonated in *Navtej Singh Johar* v. *Union of India* ('Navtej Johar').[102] The commonality between these cases was the challenge against indirect gender discrimination, which led to the doctrine's application.

As mentioned in Part II, the attempt to clarify the doctrine's incoherent application was sought to be ameliorated by Aggarwal, who formulates a four-prong test for such purpose.[103] Reading the three cases mentioned above coherently, Aggarwal propounds the prong of extant socially undesirable results as a consequence of the law — a postulated 'rule'— and checks

[95] *Id*.
[96] Essar Steel v. Satish Kumar Gupta, (2020) 8 SCC 531, ¶109 ('Essar Steel').
[97] Electoral Bonds, *supra* note 12, ¶200.1.
[98] *See generally* Pratik Datta, *Judicial Review of Central Banks: An Indian Perspective*, Vol. 7(1), INDIAN L. REV., (2022) available at https://doi.org/10.1080/24730580.2022.2160154 (Last visited on January 4, 2026); *Id*.
[99] Vivek Narayan Sharma (Demonetisation Case-5 J.) v. Union of India, (2023) 3 SCC 1.
[100] Shayara Bano, *supra* note 10, ¶1.
[101] Joseph Shine v. Union of India, (2019) 3 SCC 39, ¶2 ('Joseph Shine').
[102] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶438 ('Navtej').
[103] Vasu Aggarwal, *supra* note 44.

whether any conflicting socially undesirable results exist.[104] Aggarwal applied this test to six cases, which tested plenary legislations, and to prove the consistency in the pattern followed by the courts while holding a legislative action to be manifestly arbitrary.[105] Hence, it is found as a consistent rule on which the manifest arbitrariness doctrine, i.e., to create mechanisms for checking the law's socially undesirable results. Additionally, in all these cases, the existence of socially undesirable results was considered adequate for the Court to undertake action against such plenary legislations. Prevalent social morality norms of patriarchy and homophobia did not stop the Court from balancing the conflicts.[106] It ended by using manifest arbitrariness to strike down those provisions, adjudging constitutional morality as acquiring a higher, more legitimate ground than public morality.

However, despite similar socially undesirable results arising, the hierarchy between these moralities is ignored. The recent case of *Supriyo @ Supriya Chakraborty* v. *Union of India*[107] ('Same-Sex Marriage case') sheds light on this issue, where, despite creating factually similar circumstances, the ambiguity of manifest arbitrariness and the application of judicial deference led to the result. The SCI considered the challenge to the Special Marriage Act, 1954 ('SMA') on the grounds that it applies only to heterosexual couples, thus preventing homosexual couples from being able to marry and adopt.[108] Thus, when applying the four-step test as laid down by Aggarwal,[109] the authors find that the doctrine finds ground for its application in this case as well: *firstly*, the SMA is a rule as all its contents were given at the time of its promulgation; *secondly*, the rule is underinclusive as it excludes same-sex couples from its ambit; *thirdly*, the socially undesirable result that occurs as a result of the under-inclusivity is the discrimination of same-sex when it comes to marital rights and the same leading to their undertreatment by the society in general, with the conflicting socially desirable interests being the beneficial nature of the SMA in that it is used by heterosexual couples to enter into a marital union; and *lastly*, while balancing the rights, the Court could have down the gendered sections of the SMA to include same-sex couples as put forth by the petitioners.

The Court additionally agreed on such assertions, recognising the discrimination in society against homosexual couples and the lack of inclusivity in legislation surrounding institutions of marriage.[110] However, it was only Kaul J. who led this to the extent of violating Article 14.[111] When the petitioners proposed reading down the gendered sections of the SMA to include same-sex couples,[112] the Court refrained from interfering on the ground that extending the same to such a category was a legislative task and therefore, within the legislature's domain, especially considering that SMA is meant to serve as a 'beneficial legislation'.[113] Despite a similar factual situation arising, the applicability of the doctrine was completely ignored. This led the

[104] *Id*.
[105] *Id*.
[106] Navtej, *supra* note 102, ¶641.4.
[107] Supriyo, *supra* note 19.
[108] *Id*., ¶1–4 (per Bhat J.).
[109] Vasu Aggarwal, *supra* note 44.
[110] Supriyo, *supra* note 19, ¶112.
[111] *Id*., ¶16 (per Kaul J.).
[112] *Id*., ¶85 (per Bhat J.).
[113] *Id*., ¶¶85, 154, 165.

Court to acquiesce in gender discrimination, with marriage rights being the privilege of heterosexual couples.

Similar to the three cases mentioned previously, in the Same-Sex Marriage case, there was a socially undesirable result — the innate discrimination regularly faced by same-sex couples in their private lives. The Court also observed that the absence of statutory provisions perpetuates such results, allowing them to claim marital rights.[114] However, there was a stark difference in the approach of the Court, leading it to leave the matter entirely in the hands of the executive and the legislative. The justification that SMA was a beneficial legislation could not stand. In Joseph Shine, the Court observed that "a legislation which takes away the rights of women to prosecute cannot be termed as a 'beneficial legislation'".[115] This makes it undeniable that the 'beneficial legislation' defence cannot be taken as a defence against a socially undesirable result.

Thus, even though the test was satisfied, the Court still refrained from applying the doctrine and deferred from making any changes. This clearly highlights a dichotomy of the courts when it comes to treating even similar socially undesirable situations differently from others. Yet, one can argue that the answer to such application of different standards is found in Aggarwal's test of manifest arbitrariness itself.

The first condition in the test was the existence of an *ex-ante* postulated rule to which the standard can be applied.[116] In other words, Aggarwal suggested that legislative action must be taken to ensure such scrutiny. In the Same-Sex Marriage case, the SMA had provided only for heterosexual couples and was silent on the former.[117] Thus, there existed legislative inaction *vis-à-*vis homosexual couples and their right to marry. Similarly, despite the Act being under-inclusive, the petitioners' request for relief went beyond merely declaring the law unconstitutional on such grounds — it extended to directing the remedying of this under-inclusivity by asking for homosexual couples to be included within the legislative fold, thereby curbing legislative inaction.

On the other hand, Shayara Bano and Navtej Johar dealt with the constitutionality of the Shariat (Application) Act, 1937 and §377 of the IPC, respectively.[118] In essence, there existed legislative action in these cases. Furthermore, these legislations were over-inclusive in their own respects, and the relief granted therein was *vis-à-vis* declaring it unconstitutional to the extent of such over-inclusivity.[119] Even in an under-inclusive situation, such as Joseph Shine, the relief still extended to declaring §497 of the IPC as unconstitutional.[120] Hence, despite the two divergent phenomena dealing with issues of social undesirability, cases like Shayara Bano and the rest could be differentiated from the Same-Sex Marriage case on the ground that while one was undertaking scrutiny of legislative action, the latter was primarily founded on legislative inaction, restricting

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[114] *Id*., ¶156.

[115] Masoom Sanyal, *The Supreme Court's Marriage Equality Judgement- III: Judicial Creativity and Justice Kaul's Dissenting Opinion*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY, October 29, 2023, available at https://indconlawphil.wordpress.com/?s=beneficial+legislation (Last visited on January 4, 2026); Joseph Shine, *supra* note 96, ¶274.

[116] Vasu Aggarwal, *supra* note 44.

[117] Supriyo, *supra* note 19.

[118] Shayara Bano, *supra* note 10, ¶1; Navtej, *supra* note 102, ¶12.

[119] The Shariat Act was held overinclusive to the extent it validated practices like triple talaq or *talaq-e-biddat*, while §377 of the IPC was held overinclusive to the extent it criminalised homosexuality. Both were later declared unconstitutional to that extent.

[120] Joseph Shine, *supra* note 101, ¶282.1.

the doctrine's applicability to the former category. Furthermore, since manifest arbitrariness has been applied in the form of declaring a law unconstitutional, the Same-Sex Marriage case does not clearly fit within its purview, by virtue of the peculiar nature of reliefs pleaded for.

However, such hairline distinctions would be untenable as being antithetical to manifest arbitrariness itself. In principle, the doctrine ties its roots to issues that violate Article 14, making the doctrine only a mechanism of Article 14's application.[121] A textual understanding of the Article explicates that it is not meant to be restricted to cases involving legislative action only. The article reads as — "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."[122]

Since the Article guarantees "equal protection of laws" to any person, circumstances when such protection is not granted due to legislative inaction could potentially attract a violation of the right to equality.[123] Hence, if legislative inaction is covered by the most textual understanding of Article 14, there ought to be no reason for the manifest arbitrariness doctrine to limit its applicability to simply legislative action. Imposing such limitations on its reading would, ironically, result in an 'underinclusive' nature of the doctrine itself, creating a 'socially undesirable' instance, as Aggarwal would put it.[124]

Furthermore, it is argued that putting legislative action as a requirement to attract manifest arbitrariness would be a superficial understanding of the doctrine, without paying heed to the intent behind its creation. At its core, arbitrariness is meant to safeguard the Indian constitutional polity from *ex facie* unreasonable actions.[125] Such actions remain uncovered by the reasonable classification test, which seeks to undertake a comparison of two entities for equality to be attracted.[126] Since arbitrariness was brought in to fill in such lacunae, manifest arbitrariness extends this logic to the legislative organ, suggesting that even the legislature can create undesirable situations from which the polity should be protected.[127] Whether such a situation arises through legislative action or inaction is an immaterial understanding and would only deviate from the doctrine's main purpose. In light of this, the situation that arose in the Same-Sex Marriage case ought to have been equally covered by the doctrine. The lack of its application raises serious questions about the method adopted by constitutional courts for applying standards that allow it to conduct judicial review.

Lastly, for the sake of argument, even if it is assumed that the existence of a legislative action is necessary to apply manifest arbitrariness. In that case, one's understanding of the distinction between a legislative action and inaction must be viewed more holistically. This would require rethinking what constitutes a legislative 'action' to cover situations where such actions exist, albeit in forms different than what the current jurisprudence on manifest arbitrariness has been exposed to.[128] For instance, Laurence Tribe argues a situation of Broader State Action —

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[121] The Constitution of India, 1950, Art. 14; *See generally* Anwar Ali Sarkar v. State of West Bengal, AIR 1951 SC 41 ('Anwar Ali Sarkar'); *See generally* Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1.
[122] *Id*.
[123] *Id*.
[124] Vasu Aggarwal, *supra* note 44; C.f. Part II.B. on "Judicial Deference" (the doctrinal basis of such limitations can be found here).
[125] Khaitan, *supra* note 14.
[126] Anwar Ali Sarkar, *supra* note 121.
[127] EP Royappa, *supra* note 10, ¶85; Khaitan, *supra* note 14.
[128] Vishakha v. State of Rajasthan, AIR 1997 SC 3011; NALSA v. Union of India, (2014) 5 SCC 438.

where repeated negligence on the part of the State to intervene in certain issues and effectively leaving them at the hands of private individuals also counts as a form of "purposeful State tolerance".[129] Such tolerance by the State, as per Tribe, also constitutes a form of State action.[130] Applying such an understanding to the present dilemma would suggest that the inaction, as well as the Union of India's refusal to allow any action to be taken to grant same-sex couples marital and adoption rights, constitutes its own form of State/legislative action in the form of State tolerance. Hence, since such a situation continues to be covered by the anvils of equality as argued above, why should manifest arbitrariness be precluded from being applied herein?

### *C. THE PARADOX OF FREE AND FAIR ELECTIONS*

When the issue surrounding electoral bonds was initially brought before it, the SCI, in its 2019 order, noted that the matter would significantly impact the upcoming elections.[131] It mentioned that the contentions would require in-depth hearings and could not be completed within the time remaining until the 2019 general elections, which the judgment could potentially impact.[132] As a result, owing to reasons of public interest, the matter was not considered until after the elections.[133] Thus, the Court had chosen to defer to the electoral bond scheme with the view of not hampering processes that lay outside its domain, irrespective of the constitutional validity of such a scheme. However, when the matter was subsequently deferred to 2024, despite the decision being taken only a few months before the 2024 general elections, similar arguments on 'public interest' were not considered.[134] Hence, the Electoral Bonds judgment gave rise to more questions than it answered. It refused to resort to judicial evasion or abnegation, citing reasons of public interest. Rather, it chose to directly deal with the issue at hand, not only striking down the amendments as *void ab initio*, but directing the State Bank of India to disclose funding under the scheme before the elections begin.[135]

Furthermore, as mentioned earlier, the primary consideration on which the Court based its judgment was the overarching effects of the scheme, or potential effects of the scheme at the time when the decision was being arrived at, on the "constitutional values" of free and fair elections.[136] The amendments made to bring in the same being manifestly arbitrary were a significant reason why the Electoral Bond scheme was held unconstitutional.[137] Hence, it could be argued that the Court's proactive approach, despite the circumstances it was placed in, was by virtue of the constitutional significance of the questions placed before it. Since not deciding upon such issues of electoral process could create severe ramifications on a nationwide election a few months away, this allowed the Court to remain affirmative in its method of dealing with the case,

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[129] Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW (University Textbook Series, 3rd ed., 2000).
[130] *Id*.
[131] Association for Democratic Reforms v. Union of India, (2019) SCC OnLine SC 1878, ¶14.
[132] *Id*.
[133] *Id*., ¶¶14–18 (While the SCI did not explicitly cite the term 'public interest', the route it took involved deferring the process in order to prevent any potential effect on the 2019 general elections, essentially preventing any harm to the process of paramount general public interest in the country).
[134] Electoral Bonds, *supra* note 12, ¶¶81–86.
[135] *Id*., ¶151.
[136] Electoral Bonds, *supra* note 12, ¶¶136–140.
[137] Corriea, *supra* note 37.

even going to the extent of striking down the amendments as a whole, as opposed to undertaking an alternative and ameliorative approach based on public interest.[138]

Much like in the Electoral Bonds case, the case of *Jaya Thakur* v. *Union of India*[139] ('Jaya Thakur') similarly revolved around matters of extreme constitutional significance, yet the Court's approach starkly differed. In December 2023, the Parliament passed the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023 ('Election Commissioners Act'), which created a panel of three members to appoint election commissioners.[140] Significant issues over the integrity of the electoral process, with concerns over the independence of appointing election commissioners, were raised.[141] Hence, violation of constitutional values like those raised in the Electoral Bonds case formed the core of the petitioner's arguments. Furthermore, like Electoral Bonds, Jaya Thakur was brought up in light of the 2024 elections, following a similar timeline. However, a crucial distinction between the two was that in the former, the relief claimed was declaring the legislative amendments as unconstitutional, which makes such State action *void ab initio*. In contrast, in the latter, the petitioners were merely arguing for a temporary stay order on the legislation,[142] till the time the matter is resolved before the Court, hence being less encroaching on legislative powers than a declaration of unconstitutionality. Hence, considering the similarity of issues raised, coupled with overlapping contextual backgrounds, one would assume the stance taken in both cases to be similar. Since courts can grant a stay only if a law is manifestly unjust or unconstitutional,[143] one would expect the Court to apply the same reasoning here as in the Electoral Bonds case.

However, the SCI dismissed the petition pleading for a stay order without delving into the issue of the legislation's manifest unreasonability.[144] While the Court considered the requirement for granting an interim stay on legislation, it refused to even consider the reservations raised by the petitioners.[145] It held that any stay or injunction would interfere with the general elections and the same would be against public interest, a ground that already stands rejected as mentioned above.[146] There being a lack of a fixed standard to grant an interim stay on legislation on the grounds of constitutionality is not a position that the Court can defend because the only question before it was whether the law violated the independence of the Election Commission on a *prima facie* reading. Free and fair elections, a definite component of the 'constitutional values' as mentioned in Electoral Bonds,[147] can only be conducted when those at the helm of the organisation conducting them are chosen impartially. Any legislation that attacks the same should be subjected to greater scrutiny than merely holding the question off for a more suitable time. The lack of engagement with the petitioner's arguments over a public interest argument, despite the order being given in light of the Electoral Bonds, raises serious questions not only over its

[138] Electoral Bonds, *supra* note 12, ¶¶136–140.
[139] Jaya Thakur, *supra* note 19.
[140] The Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023, §7.
[141] Jaya Thakur, *supra* note 19, ¶2.
[142] *Id*., ¶1.
[143] Bhavesh D. Parish v. Union of India, (2000) 5 SCC 471, ¶30 ('Bhavesh D. Parish').
[144] Jaya Thakur, *supra* note 19, ¶¶12–16.
[145] *Id*., ¶12.
[146] *Id*.
[147] Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1, ¶198.

tenability, but also makes one question how such an approach to conducting judicial review is viable when precedents applying different judicial standards exist.

The Court's contradictory stance — upholding the manifestly arbitrary doctrine in one instance while deferring to the public interest in another — reflects a troubling inconsistency in judicial deference when constitutional values are at stake.

In this conflicting scenario, applying different standards very clearly indicates the Court's polyvocality, considering the cases being set in similar situational circumstances while warranting the application of similar thresholds. This leads to the apex court's separate benches speaking in multiple voices for matters that ought to be dealt with consistently. In this regard, the potential reconciliation could be concerning the legal background in which these two cases are set. The distinction in such a background could have warranted the results, thereby clarifying the scope of judicial review based on this distinction. In the Electoral Bonds case, the facts revolved around making amendments to a series of legislations that ought to create exemptions from the general norms surrounding political contributions.[148] For instance, §182 of the Companies Act, 2013, originally set a limit on how much companies could donate to political parties.[149] However, an amendment done via the Finance Act, 2017, added a proviso that removed this limit if the donation was made through electoral bonds, effectively creating an exception to the earlier rule.[150]

On the contrary, no such legislation existed for the appointment of Election Commissioners before the Act of 2023.[151] Despite Article 324 empowering the Parliament to make laws in this regard, the country's elections were held in the absence of the same.[152] Hence, while declaring electoral bonds unconstitutional would result in parties and corporations falling back to the general rules as they existed before the scheme, a different situation would arise *vis-à-vis* the Election Commissioners Act.[153] Granting even a stay order, a temporary action that does not amount to a declaration of unconstitutionality, could result in a legislative vacuum when elections are at the polity's doorstep.[154] Such a vacuum at crucial points of time would inevitably be detrimental to public interest. Hence, granting such an order on grounds of "glaring unconstitutionality"[155] would harm public interest, staying its applicability. This seeks to create a threshold wherein a legislative vacuum in urgent times would prevent the application of manifest arbitrariness, or tests akin to it, even if the legislation in question could be potentially unconstitutional. This allows the court to defer to the State in only exceptional matters when such a vacuum exists, allowing the power of judicial review to be wielded as the general norm.

However apt this may sound, the authors argue this reconciliation is untenable, as it would not only misunderstand the facts in this regard, but would also be a *carte blanche* for

[148] Electoral Bonds, *supra* note 12, ¶¶1–10.
[149] The Companies Act, 2013, §182.
[150] The Finance Act, 2017, §154.
[151] The Election Commissioners Act, 2023.
[152] The Constitution of India, 1950, Art. 324; Manav Pamnani, *Constitutional Bench Explainer Series: Anoop Baranwal v. Union of India*, LAW AND OTHER THINGS, June 5, 2023, available at https://lawandotherthings.com/constitutional-bench-explainer-series-anoop-baranwal-v-union-of-india/ (Last visited on January 4, 2026).
[153] The Finance Act, 2017, §§11, 135, 137, 154; The Companies Act, 2013, §182; The Representation of People's Act, 1951, §29C; The Reserve Bank of India Act, 1934, §35.
[154] Jaya Thakur, *supra* note 19.
[155] Bhavesh D. Parish, *supra* note 143.

potentially unconstitutional State action to operate in times where the need for a just law is essential for such respective subject.

With respect to the circumstances of the case, though there would exist a 'legislative vacuum' if the stay order were granted, it would not go to the extent of creating a 'legal vacuum'. In other words, before the Election Commissioners Act was enacted, the SCI in *Anoop Baranwal* v. *Union of India* ('Anoop Baranwal') had provided for a three-member panel that could elect such commissioners.[156] Although such a panel was intended to be only a temporary measure and not one that would override legislation, the Court was clear that its function is to ensure the independence and integrity of the election process until a law guaranteeing the same is enacted.[157] Since the Constitution considers the SCI's judgments to have the force of law all throughout the territory of India, it would acquire the same footing as legislation.[158] Hence, granting a stay on the operation of the Act would not create a legal vacuum leading to anarchy in the state of affairs. Similar situations might arise in other constitutional cases, debunking the viability of the 'legislative vacuum' threshold for judicial deference.

Furthermore, though the efficacy of the Anoop Baranwal formula can be questioned, the panel was made keeping in mind the need to maintain the integrity of the election process. Resultantly, the panel would comprise the Prime Minister, the Leader of Opposition, together with the Chief Justice of India — ensuring there is no apprehensible tilt in favour of any political bloc.[159] However, when the Act replaces the Chief Justice with a Cabinet Minister, it inevitably allows the government to have greater control over such an appointment, creating apprehension of bias. Others have criticised the Court for ignoring this factor while refusing to grant a stay.[160] It is argued that the Court, under the guise of public interest, sought to legitimise the operation of a law that is potentially violative of free and fair elections. This makes one question whether the court could have reasonably bypassed reviewing the Act given its manifest unreasonableness. It exacerbates the issue of the extent of judicial review, since the untenability of the limitations created is readily apparent, and equally affects the issue of free and fair elections as it does in Electoral Bonds.

This highlights that the Court considers manifest arbitrariness, or tests akin to it, within a binary paradigm of striking down a law or not. Even if a stay order would have been detrimental to 'public interest', and given the untenability of the current approach, it is argued that the Court ought to have explored alternative means which it deemed fit to alleviate the circumstances, recognising issues of legislative vacuum, if any, while preventing undesirable results from occurring. The understanding opted for by the courts operates within a binary paradigm of whether a law is applicable or not. However, given the nuances of situations, it would call for the court to respond to the same by exploring other means when either of the two means

[156] Anoop Baranwal v. Union of India [Election Commission Appointments], (2023) 6 SCC 161, ¶463 ('Anoop Baranwal').
[157] Jaya Thakur, *supra* note 19, ¶¶15, 18.
[158] The Constitution of India, 1950, Art. 141.
[159] Anoop Baranwal, *supra* note 156.
[160] Hardik Choubey, *The Supreme Court, The Election Commission and the 18th Lok Sabha Elections-I: On the SC's Refusal of a Stay Order in the Election Commissioners' Case*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 22, 2024, available at https://indconlawphil.wordpress.com/2024/05/22/the-supreme-court-the-election-commission-and-the-18th-lok-sabha-elections-i-on-the-scs-refusal-of-a-stay-order-in-the-election-commissioners-case-guest-post/ (Last visited on January 4, 2026).

available in the binary seek to create an undesirable situation. This is explored further in subsequent portions of the paper to alleviate the existing issues.

### *D. NO BLANKET REASONING IN BLANKET GOVERNMENT RESTRICTIONS: KUNAL KAMRA V. UOI AND FOUNDATION FOR MEDIA PROFESSIONALS*

In *Kunal Kamra* v. *Union of India* ('Kunal Kamra'),[161] the Bombay High Court ('HC') shed light on the constitutionality of the amendment to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('IT Rules, 2021'), specifically Rule 3(1)(b)(v). The Rule provided for removing content from online intermediaries because it was flagged by the government's 'Fact Checking Unit' ('FCU').[162] G.S. Patel J. held that the discretion granted to the FCU for flagging any content as fake, false, or misleading is manifestly arbitrary.[163] He discussed the Rule's vagueness as a ground for holding it as overinclusive and unconstitutional.[164] He mentioned that the vagueness could lead to indiscriminate application of the rule and a blanket ban on any statements that the FCU thinks are 'fake, false or misleading'.[165] He further stated that the amendment takes the form of censorship of user content and digital rights, thereby indirectly violating the right to free speech.[166]

While having similarities in facts with Kunal Kamra, *Foundation for Media Professionals* v. *State (UT of Jammu & Kashmir)* ('Foundation for Media Professionals')[167] took a very different approach to another blanket ban imposed by the government. In this case, the petitioners challenged the restriction on 4G internet in Jammu & Kashmir on the grounds that it violated their freedom of speech. The government's primary defence was that the measures undertaken came under the domain of policymaking and national security.[168] The petitioners contended that if the government could prevent the misuse of data services, it could consider restricting the internet in areas where such misuse was more likely to occur.[169]

Despite the Court's recognition in both cases that the impugned measures were blanket in nature, their outcomes differed substantially, as in this case, it rejected this argument based on "compelling circumstances of cross-border terrorism".[170] The Court recognised the necessity of balancing national security concerns against the fundamental rights of citizens after considering the proportionality of the restriction placed. However, despite making observations akin to specifying the restrictions placed as disproportionate, unreasonable and illegitimate,[171] the Court did not take any steps to hold those restrictions as unconstitutional and instead ordered the formation of a special review committee, comprising exclusively of members from the Union

[161] Kunal Kamra v. Union of India, 2024 SCC OnLine Bom 3984 ('Kunal Kamra').
[162] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, R. 3(1)(b)(v).
[163] Kunal Kamra, *supra* note 161, ¶¶202–218.
[164] *Id*., ¶207.
[165] *Id*., ¶214.
[166] *Id*., ¶212.
[167] Foundation for Media Professionals v. State (U.T. of Jammu & Kashmir), (2020) 5 SCC 746 ('Foundation for Media Professionals').
[168] *Id*., ¶7.
[169] *Id*., ¶6.
[170] *Id.*, ¶20.
[171] *Id*., ¶¶17–20.

Executive. This is contrary to Kunal Kamra, where, after determining that the measures undertaken were unreasonable, the Court took action and held the amendment unconstitutional.

While Kunal Kamra and Foundation for Media Professionals addressed blanket government-imposed restrictions that impacted free speech, the judicial outcomes diverged significantly. In Kunal Kamra, the Court took decisive action by striking down the vague and overbroad rule, prioritising constitutional protections for free speech. Conversely, in Foundation for Media Professionals, despite recognising the disproportionate and arbitrary nature of the 4G internet restrictions, the Court refrained from declaring the measures unconstitutional, opting instead to establish a review mechanism. This contrast highlights how balancing individual rights and state interests, such as national security, can lead to differing judicial approaches, even in cases with factual parallels.

The Bombay HC in Kunal Kamra and the SCI in Foundation for Media Professionals dealt with similar issues of State action being excessive and unreasonable. While the former dealt with vagueness and over-inclusivity in the provisions of the IT Rules, 2021,[172] the latter deals with blanket orders allowing only limited internet services, thus primarily revolving around arbitrary State actions.[173] Yet, there is a difference in approach undertaken, with the HC being more proactive than the SCI. One could justify this in the context of digital rights and free speech by referring to the issue of national security.[174] The SCI contextualises its reasoning in the backdrop of Jammu and Kashmir, a cross-border security-prone Union Territory affected by recent events.[175] On this ground, it affirms the existence of compelling circumstances without undertaking a detailed inquiry to affirm the same.

The HC in Kunal Kamra, admittedly, dealt simply with the constitutionality of certain sections of the IT Rules, 2021. There was no issue of national security under which the HC's judgment operated, and it was, as the Court in Foundation for Media Professionals held, based on normal considerations.[176] Thus, the question of curbing freedom of speech attracts greater concern to Kunal Kamra, as it does not have the force of national security to the same extent as the SCI does here, and hence, there are lesser grounds to justify curtailment. This would prompt the Court to undertake a more proactive inquiry by examining the peculiarities of the IT Rules, 2021, to determine whether the restrictions on free speech are justified. On the other hand, the reasonability of the restriction in the case before the SCI would be much more apparent, since the cause of national security prevails. This reconciliation would highlight the difference in standards applied to each case.

However, it can be argued against such a distinction as one that has been rejected not only by the authors but also by the SCI before. Recent jurisprudence on the grounds of national security highlights that the Court cannot take a hands-off approach when national security is cited as a ground and must conduct an adequate inquiry for its satisfaction.[177] Thus, the Court must note

[172] Kunal Kamra, *supra* note 161, ¶16.
[173] Foundation for Media Professionals, *supra* note 167, ¶6.
[174] *Id*.
[175] *Id*., ¶¶15, 20.
[176] *Id*.
[177] Manohar Lal Sharma (Pegasus Spyware) v. Union of India, (2023) 11 SCC 401, ¶53 ('Pegasus'); Madhyamam Broadcasting Ltd. v. Union of India, (2023) 13 SCC 401, ¶87l ('Media One'); Anuradha Bhasin v. Union of India, (2020) 3 SCC 637, ¶56.

whether the national security ground is strong enough to reasonably restrict free speech, based on sufficient evidence provided by the government.[178] Furthermore, the Court has also devised means to inquire into the reasonability of restrictions. For instance, in *Media One* v. *Union of India* ('Media One'), a television channel was prevented from broadcasting on national security matters, which were neither questioned by the Court nor disclosed to the petitioner. While the Kerala HC upheld this act, the SCI struck it down on the abovementioned grounds.[179] It created 'public interest immunity proceedings' that would allow scrutiny of national security grounds, alongside whether the restrictions placed are proportional.[180] Applying this logic to the Foundation for Media Professionals would necessitate the Court to take an approach similar to the one in Kunal Kamra, before declaring a free speech restriction valid. Thus, the extent of judicial review required would have to be comparable, if not the same, as that of the Bombay HC. Unfortunately, the Court sought to create barriers for itself, limiting its exercise of scrutiny.

### *E. BALANCING THE TWO DOCTRINES*

The above conflicts have elucidated the use of judicial deference in evading application of constitutional commitments via the doctrine of manifest arbitrariness. The argument is strengthened by the factor of similarity between the conflictual case laws. Having highlighted such pernicious use of deference, the authors do not intend to negate the utility of deference in the Indian constitutional democracy. Like several foundational features, the separation of powers constitutes a fundamental component of the authors' framework. Judicial deference is also imperative in preventing courts from bringing matters to which they are not competent to deliver judgments within their own purview. This allows legitimate experts to operate within their respective fields, instead of judicial usurpation of power.

For this reason, the authors propose that the contours of judicial review in India must be defined in a manner that incorporates both doctrines in their respective forms. However, consistency ought to be established in their application across constitutionally significant issues to prevent undesirable results, like the ones above, from arising. This is tantamount to proposing a model of judicial review that would serve such a purpose by resolving the above-identified conflicts. However, for the model to be constitutionally sound and justifiable for subsequent judicial review action, it cannot simply deal with the above conflicts, but also deal with larger issues arising, if any. This is elucidated in the subsequent sections of the paper.

## IV. INVOKING RESPONSIVE JUDICIAL REVIEW

The authors have elucidated the newly emerging conflicts of contours of judicial review, and pertaining issues of legitimacy therein. This is conducted with specific reference to the doctrines of judicial deference and manifest arbitrariness that cover the larger ground of modern Indian constitutional jurisprudence.[181] Furthermore, since the relevance of each has been

[178] Pegasus, *supra* note 177, ¶40.
[179] Media One, *supra* note 177, ¶¶39–41.
[180] *Id*., ¶130; Gautam Bhatia, *Proportionality, Sealed Covers and the Supreme Court's Media One Judgement*, THE WIRE, April 6, 2023, available at https://thewire.in/law/supreme-court-media-one-sealed-cover-analysis (Last visited on January 4, 2026).
[181] Jahnavi Sindhu, *Public Reason and Constitutional Adjudication in India*, Vol. 2(1), ELGAR ONLINE (2024) available at https://www.elgaronline.com/view/journals/ccs/2/1/article-p140.xml (Last visited on January 4, 2026).

substantiated, any solution proposed to resolve the underlying issues must be of a nature that seeks to harmonise the two conflicting doctrines, seeking to create a balance. Such harmonisation would affirm their relevance, showcasing their integral nature in the constitutional design, while preventing core constitutional principles from running counter to each other.

However, the inquiry does not end there. Not only is the issue of consistency a presently faced problem, but it also remains to be solved by the constitutional courts and academic literature. Moreover, as the authors contend in this part, this failure stems from rigid understandings of judicial review that largely stem from a Global North perspective on the origin of judicial review. Thus, the onus lies on authors to propose novel solutions which dynamise the constitutional design to bring consistency. Such dynamism would involve an evolution of judicial and legislative roles beyond the conventional 'Montesquieuan' framework,[182] specially designed to meet the needs of Global South democracies like India that vastly differ in their constitutional culture and framework.[183] This might entail a substantial reimagination of the judicial review doctrine.

In this part, the authors seek to conduct this inquiry using Dixon's Responsive Judicial Review, modified to suit the purpose. *First*, the authors shall delineate the model proposed by Dixon, and its relevance towards resolving the dilemma. *Second*, such a model must be critiqued in the backdrop of existing issues identified in the above sections, alongside any other query that would be relevant to make the model suitable for the Indian constitutional framework. *Third*, the core issues identified with Dixon's model are contextualised *vis-à-vis* the surrounding literature on the topic, highlighting a universally propagated ideation of valorising judicial deference in the Global North.[184] Such limitations created on the Court's capacity, while integral to maintain the separation of powers framework, are inadequate in this context.[185] *Fourth*, based on such identified issues, the authors modify Dixon's model to suit the Indian context, contributing to the literature's evolution on responding to the needs of Global South constitutionalism while conducting the evolution of such constitutionalism to envisage new forms of itself to serve its purpose.

### *A. DEFINING RESPONSIVE JUDICIAL REVIEW*

Scholars from the American constitutional realm have always sought to limit the Court's role in interfering with the government's decisions.[186] Terming a Court's activist stance as "counter-majoritarian difficulty", the underlying prevailing logic was on judicial review's limited legitimacy in a democracy, which could overturn decisions of the people's representatives.[187] Such counter-majoritarianism was proposed to be generally avoided to allow democracy to prevail. Building on this, learned scholar John Hart Ely proposed the "representation-reinforcement theory", where the courts' main objective in undertaking judicial review was to "counter

[182] Montesquieu, *supra* note 7 (The classical Montesquieuan framework suggests the theory of separation of powers, alongside sufficient check and balances. Here, each organ of the government operates within its own sphere, and while its purpose is to keep a check on each other, it must be limited such that one does not usurp functions of the other).
[183] Bruce Ackerman, *The New Separation of Powers*, Vol. 113(3), HARV. L. REV., 694 (2000).
[184] Waldron, *supra* note 6.
[185] Samuel Issacharoff, *Fragile Democracies*, Vol. 120(6), HARV. L. REV., 1406 (2007).
[186] Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, Vol. 14, GERMAN L.J., 2255 (2013).
[187] Alexander M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 16–17 (Yale University Press, 2nd edn., 1962).

malfunctions in the democratic process" — to uphold values of free and fair elections while preventing the legislature from becoming non-representative of the people's will.[188] This would be limited to the protection of only "discrete" and "insular" minorities that are systemically disadvantaged by a representative system that seeks to subdue such groups under the majority's will.[189] Thus, while Ely recognised the Court's role in checking majoritarian tendencies, it was only a limited one, upholding the earlier logic from before.[190]

Although seemingly progressive, Dixon identifies the inadequacy of Ely's model in addressing the growing issues of democratic dysfunction in constitutional democracies worldwide.[191] Critiquing Ely to rely only on an analysis of American constitutionalism in extending equal rights to the Afro-American community, Dixon holds him to propagate a narrow, or conventionally called, a 'thin' understanding of democracy that places importance only on the representative nature of the process.[192] Such conceptions dissociate democracy as an integral constitutional value from other existing constitutional values, such as civil and political rights.[193] Furthermore, his limitations for the Court to undertake a counter-majoritarian stance only in matters involving discrete and insular minorities are argued to be exclusionary of several minority groups arising in numerous socio-political contexts that are not similarly situated as the Afro-American community in the US, and hence, not "discrete and insular".[194] In this context, Dixon, who calls herself a Neo-Elyian, argues for combining a 'thick' conception of democracy- that regards rights-based protection as crucial for the purpose of enhancing democratic participation and deliberation — with the thin understanding, to propose what she considers as 'responsive judicial review' ('RJR').[195]

According to Dixon, the core task of judicial review is to interpret constitutions with the object of countering democratic dysfunction existing in the form of*: firstly*, risks of antidemocratic monopoly power; *secondly*, democratic blind spots, in essence, where legislations fail to clarify on crucial positions of individuals and groups, which must be aligned with constitutional principles; and *thirdly*, legislative burdens of inertia, where due to a combination of several factors the legislature is unable to act upon the people's will, diminishing its representative character (similar to State inaction as in the case of Same-Sex Marriage).[196] Dixon holds such a model as 'responsive' by virtue of the Court's endeavour to contextualise the constitutional issue in the realm of socio-political issues surrounding it, alongside the implications that would arise out of conducting judicial review of State action.[197] This would assist the Court in responding to issues that diminish the democratic character of a polity, what she calls the "democratic minimum core",

[188] Ely, *surpa* note 56, 73–74.
[189] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (United States Supreme Court).
[190] Dixon, *supra* note 20.
[191] *Id*.
[192] Bruce A. Ackerman, *Beyond Carolene Products*, Vol. 98, HARV. L. REV., 713 (1984).
[193] Dixon, *supra* note 20.
[194] Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, Vol. 89, Yale L.J. 1037 (1979); *Id*. (To elucidate, Dixon argues that Ely would have been critical of the decisions of United States' Supreme Court in Lawrence v. Texas, 539 U.S. 558 (2003) and Obergefell v. Hodges, 576 U.S. 644 (2015), which recognised rights in same-sex marriages, since he famously held that such moral and political value decisions ought to be made by elected representatives. This indicates the rigidity with which he interpreted discrete and insular minorities).
[195] Dixon, *supra* note 20.
[196] *Id*.
[197] *Id*., 114.

allowing constitutional doctrines and their scope to be moulded to serve these tasks.[198] Such exercise, Dixon assumes, would arise in a situation where the text of the Constitution runs out to effectively answer any matter before it, allowing the courts to engage in 'interpretive fidelity' of the Constitution.[199]

Such fidelity, however, must also be met with the Court's perceptions of its competence and legitimacy. Unlike her predecessors on the topic who severely limited the Court's role in conducting judicial review over the legislature, Dixon seeks to balance the same with the need for a democratically responsive society. She argues that the Court's exercise of judicial review should not be of such form that usurps functions of other government organs, keeping in mind the conventional theory of separation of powers.[200] Through this, Dixon proposes that in a constitutional democracy, despite certain commitments being upheld to avoid democratic dysfunction and protect the democratic minimum core, there exists reasonable disagreement on certain other factors, such as the extent to which such commitments must be effectuated.[201] This disagreement would on several occasions arise out of the competence of other institutions to deal with such matters in greater detail than the court.[202] For instance, though the US Supreme Court upheld the right to abortion, the extent to which such a right was provided and balanced with the right of the unborn foetus was left to the domain of state governments, over which the Court never proposed any claim.[203] Similarly, in the infamous *People's Union for Civil Liberties* v. *Union of India*, holding the right to food as fundamental, the Court was severely criticised for exercising excessive control over the details of nutrition provided to children.[204] Such details should have been left to the executive and concerned experts in the field.[205] Hence, in these forms, courts must be wary of their legitimacy to not overstep their boundaries, while engaging in effective dialogue with other institutions to resolve democratic dysfunction.

As mentioned earlier, the present dilemma demands a model that accommodates both the contrasting doctrines, albeit in their own spheres, to establish consistency in their application. An RJR model suits the purpose adequately by its emphasis on curing dysfunction in a constitutional democracy while remaining mindful of issues surrounding competence. For instance, in Electoral Bonds*,* the Court resonated with Ely's representation-reinforcement theory to address the legislation's role in hampering the electoral process, creating democratic dysfunction.[206] When arguments of deference in lieu of an economic legislation were made, the Court argued the effect of the impugned amendments on civil and political rights, along with the

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[198] *Id*.
[199] *Id*.
[200] Dixon, *supra* note 20.
[201] Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, Vol. 35(1), L. SOC. REV., 117 (2001).
[202] James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style" Judicial Campaigns*, Vol. 102(1), AM. POL. SCI. REV., 59 (2008).
[203] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (United States Supreme Court).
[204] Order dated Nov. 28, 2001, Peoples Union for C.L. v. Union of India, Writ Petition (Civil) No. 196 of 2001.
[205] Rosalind Dixon & Rishad Chowdhury, *A Case for Qualified Hope? The Supreme Court of India and the Midday Meal Decision,* in A QUALIFIED HOPE: THE INDIAN SUPREME COURT POLITICAL SOCIAL CHANGE (Gerald N. Rosenberg et al. eds., Cambridge University Press, 2019).
[206] Electoral Bonds, *supra* note 12, ¶207 (Court argued that democracy is sustained by the elected being responsive to the needs of electors. Thus, it questioned whether the elected was truly being responsive if such legislation is allowed to sustain. This is a logic it uses to intervene and strike down the legislation, hence reinforcing the representative nature of Indian democracy).

right to participate in free and fair elections.[207] Since it impacted democratic values, the Court reasoned that it must take a responsive approach based on the arising implications, and held such amendments to be manifestly arbitrary.[208]

Similarly, the model would have allowed the Court in the Same-Sex Marriage case to identify legislative inaction in granting non-heterosexual couples marital and adoption rights as a 'legislative burden of inertia'.[209] Since Dixon advocates for remedying the inertia, it could have empowered the Court in adopting a thicker conception of democracy, recognising the significance of extending the right to marry in preventing same-sex couples from harassment, alongside inducing democratic participation in social institutions.[210] This would have led the Court to declare such inaction as manifestly arbitrary, inducing it to develop remedies conducive to recognising the right while keeping issues of its competence in mind, thus balancing manifest arbitrariness against judicial deference.[211]

This indicates that the RJR model has the potential to bring consistency to the existing conflicts. However, its more detailed application is contingent on identifying issues with the model, if any. These issues may/may not be present in other jurisdictions, but explicate the model's inadequacy in suiting India as a constitutional democracy, thus necessitating RJR to adapt to India's constitutional needs. This would involve differentiating India from other known constitutional democracies, while indicating solutions to buttress its efficacy.

### *B. CRITIQUING RESPONSIVE JUDICIAL REVIEW*

In her response to the RJR model, Jahnavi Sindhu, while recognising its merits, also highlights the extensive focus of such a model on majoritarian understandings.[212] Being primarily a model to resolve democratic dysfunction, according to her, the RJR model seeks to understand the legitimacy of the Court's conduct of judicial review from the majority's perspective, to ensure it is duly followed by the polity while preventing any backlash against the Court's authority.[213] Sindhu critiques this factor as running against the transformative nature of the Indian Constitution, where certain actions must be taken even when they run against society's interests.[214] Basing the authors' argument on this criticism, they further highlight Dixon's review of acquiring a majoritarian undertone and its implications for sustaining the present dilemma with undesirable results. This necessitates identifying not only the need to remove any hindrances in its efficacy, but to recognise the underlying logic behind such hindrances, only to be subsequently uprooted.

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[207] *Id*., ¶209.
[208] *Id*., ¶215.
[209] Supriyo, *supra* note 19, ¶145.
[210] Rosalind Dixon, *Constitutional "Dialogue" and Deference* in CONSTITUTIONAL DIALOGUE: RIGHTS DEMOCRACY, INSTITUTIONS, 161 (Geoffrey Sigalet et al. eds., Cambridge University Press, 2019).
[211] Mark Tushnet, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (Princeton University Press, 2008).
[212] Jahnavi Sindhu, *A Responsive Theory of Judicial Review: A View from India*, Vol. 34(2), NLSIR, 79 (2021).
[213] *Id*.
[214] *Id*. (To buttress this claim, Sindhu mentions Navtej Singh Johar v. Union of India, where the Court held that it need not wait for majoritarian sentiment to catch up but must protect human dignity from majoritarian sentiments).

1. LIMITS TO DEMOCRATIC RESPONSIVENESS

The foundations of the RJR model lie in its aim to structure judicial review as a means to create democratically responsive situations. To elucidate, Dixon differentiates between what she considers a 'democratic minimum core' — a minimum core of norms and institutions necessary to safeguard electoral and institutional accountability — and any other constitutional issue which, as mentioned above, can be subject to "reasonable disagreement".[215] Any norm or value not falling within the scope of such core can be subject to reasonable disagreement between institutions like the court and legislature, ensuring the Court sticks to its limits on competency rather than over-enforcing the Constitution.[216] Such understanding has several loopholes that command an explanation.

*First*, Dixon's understanding of what constitutes a minimum core is too myopic for its sustenance in the context of Indian constitutionalism. She identifies such a core to be only related to issues pertaining to democracy as a value, as opposed to issues affecting constitutional values as a whole.[217] Though Dixon advocates for a thick conception of democracy at certain junctures, such a conception only involves a broader commitment to rights, as long as they are relevant to the issue of inducing democratic deliberation and participation among the masses.[218] In an Indian constitutional framework where issues operate on several fronts of constitutional values that do not always involve democracy, the question of constituting a legitimate exercise of judicial review remains absent.[219] This hinders the model's ability to resolve conflicts between judicial deference and manifest arbitrariness, especially when those conflicts maintain the same distinction between democracy and other values as the RJR model does.

To elaborate, the SCI in Electoral Bonds distinguished its case from R.K. Garg, which also dealt with economic legislation potentially affecting constitutional values as mentioned above.[220] In this exercise, the application of manifest arbitrariness over judicial deference was preferred due to the matter's effects on the democratic process. Despite Chandrachud J. holding that the former doctrine can be applied in cases that involve constitutional values, its differentiation from itself and R.K. Garg is perpetrated by the understanding of judicial review put forth by Dixon, which valorises democracy as a value over and above other values, allowing inconsistency in the exercise of judicial review to remain.[221] Such valorisation would be perpetrated by Dixon's innate focus on democratic responsiveness, allowing the conflict between such jurisprudence to persist.

*Second*, the model also hinders the magnitude of responsiveness of a democratically responsive judicial review. Dixon envisages a clear distinction between a 'democratic minimum core' and 'reasonable disagreement', while not accounting for the model's ability to deal with a potential overlap.[222] What is the purported method of creating a distinction between the two ideas? Furthermore, there might always arise situations where a matter potentially subject to reasonable

[215] Dixon, *supra* note 20.
[216] Mark Tushnet, *Alternative Forms of Judicial Review*, Vol. 101(8), MICH. L. REV., 2781 (2003).
[217] Dixon, *supra* note 20.
[218] Ronald Dworkin, FREEDOM'S LAW: THE MORAL REASONING OF THE AMERICAN CONSTITUTION, 17 (Harvard University Press, 1999).
[219] Manoj Narula v. Union of India, (2014) 9 SCC 1, ¶74 ('Manoj Narula').
[220] Electoral Bonds, *supra* note 12, ¶¶41–43.
[221] *Id*.
[222] Dixon, *supra* note 20.

disagreement could inevitably affect the democratic minimum core. Taking Dixon's case study for instance, like the extent of enforcing right to abortion, matters on reasonable disagreement might include the magnitude of enforcing certain commitments which might fall outside the Court's competence. However, if the extent of enforcing such right is minimal at best by keeping Court's competence as a structural limitation, this makes the right to abortion merely illusory. This would hamper the democratic participation of women in decisions that involve their reproductive autonomy, thereby hampering the democratic minimum core. Thus, the effect of one domain is clearly seen on the other. However, in that scenario, how does the Court evolve its mechanism of conducting judicial review- would it completely defer the matter to the competence of other institutions such as the legislature, or take a proactive approach towards it?

This is elucidated through the dichotomy between Navtej Johar and Same Sex Marriage. The Court in the latter differentiated itself from the former, arguing that its case involved polycentric issues that were outside the Court's scope, unlike Navtej Johar, that simply dealt with the constitutionality of a legislation that criminalised same-sex couples, preventing their effective participation.[223] Hence, in other words, the case before the Court was an issue of reasonable disagreement, whereas Navtej Johar could be argued as a case pertaining to the democratic minimum core. However, as argued above, not granting same-sex couples marital and adoption rights, though subject to disagreement on its contents, would still affect the ability of same-sex couples to effectively participate in social and democratic institutions, thereby affecting the democratic minimum core. In such situations, where would the Court draw the line between these two entities, and thereby, where/where not to adjudicate?

Building on the above argument, the magnitude of democratic responsiveness is substantially hindered if the Court creates limits on evidence of material that could potentially impact democratic participation. Dixon holds that such responsiveness must be based on evidence at hand.[224] However, if such evidence is classified or confidential, or not readily accessible by "outsiders" to an institution withholding such evidence, it would be prudent for courts to apply a more relaxed standard of assessing such evidence.[225] This would not only aggravate the existing conflicts identified between the doctrines but also run counter to recent judgments that could be considered responsive to dysfunctions.[226]

For instance, in Foundation of Media Professionals, despite the vagueness of evidence to prolong an ineffective internet shutdown, the Court admitted the argument of "compelling circumstances" to exist without ever questioning what such circumstances were.[227] Unlike the Court in Kunal Kamra that refused to uphold a law limiting free speech unless a proximate nexus between free speech and public order was established by strong evidence, the Court here refused to scrutinise the evidence that hinted towards such circumstances existing, considering their innate exclusivity to the executive on national security grounds.[228] On this basis, it held that any such scrutiny of evidence would be conducted by a panel comprising only members of the executive, eluding the judiciary's control over it.[229] Such an approach seems similar to what

[223] Supriyo, *supra* note 19, ¶164.
[224] Dixon, *supra* note 20.
[225] *Id*.
[226] *See* Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶32.
[227] Foundation for Media Professionals, *supra* note 167, ¶20.
[228] Kunal Kamra, *supra* note 161, ¶55.
[229] Foundation for Media Professionals, *supra* note 167, ¶24.

Dixon proposes. However, as mentioned previously, this effectively provides a *carte blanche* to the executive to curtail free speech via the Internet, thereby curtailing democratic participation while preventing the Court from responding to such an issue.[230] Furthermore, it also runs afoul of the ratio of Media One, which concludes against the confidentiality of evidence while conducting proceedings that would allow the other party to have access to it.[231] Despite responding to a serious hindrance to democratic deliberation, the Court's approach in Media One would run afoul of Dixon's argument on allowing certain evidence to remain confidential.[232] It not only elucidates the incompatibility of Dixon's model with recently lauded judgments in Indian jurisprudence on issues pertaining to fundamental rights application, but also proves how the limitations surrounding democratic responsiveness ought to be answered more effectively to resolve conflictual situations of when to exercise judicial deference here.

2. THE BURDEN OF 'POLITICAL LEGITIMACY'

The crucial nature of judicial deference to limit the Court's overreach in domains beyond its control is not ignored by the authors. In fact, it becomes the reason behind adopting Dixon's model to balance deference against the manifest arbitrariness instead of allowing the former to be subdued.[233] However, Dixon's focus on legitimacy does not limit itself to legal and constitutional conceptions where courts should not intervene, but also carries with it a weightage of other concerns, which, though presumptively legitimate, could hinder a faithful exercise of judicial review in line with constitutional principles in India.

Dixon emphasises that a judgment, while being responsive, must also protect its legitimacy to allow its judgment to be followed by the people, while preventing any situation that may seek to subdue its powers.[234] Thus, conducting judicial review for the courts would mean to avoid 'reverse burdens of inertia', where the masses do not follow a judgment or the legislature refuses to act upon it in light of its disagreement.[235] The exercise of judicial review also ought to avoid any democratic backlash that might arise against the judgment, which could become a reason to impose limitations on the Court's authority to grant judgments.[236] Such factors are well reasoned, and put the Court's exercise of its powers in a socio-political context than dissociating the law from such factors.

However, to prevent such contingencies, Dixon argues that an exercise of judicial review must carry with it not only legal, but also political legitimacy.[237] In essence, it must be acceptable to the democratic majority for it to follow the same, and such exercise must be informed

[230] Natasha Maheshwari, *The Constitutionality of the Manipur Internet Shutdown*, SOCIO LEGAL REVIEW FORUM, August 22, 2023, available at https://www.sociolegalreview.com/post/the-constitutionality-of-the-manipur-internet-shutdown (Last visited on January 5, 2026).
[231] Media One, *supra* note 177, ¶¶39–41.
[232] *Id*.
[233] Epstein et al., *supra* note 201.
[234] Dixon, *supra* note 20.
[235] Bilyana Petkova, TOWARDS A DISCURSIVE MODEL OF JUDICIAL LEGITIMACY FOR THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE EUROPEAN COURT OF HUMAN RIGHTS (Phd Dissertation, University of Kent, 2013).
[236] Backlash Politics: *Introduction to a Symposium on Backlash Politics in Comparison*, Vol. 22(4), BRIT. J. INT 'L REL., 563 (2020).
[237] Dixon, *supra* note 20.

by democratic majoritarian attitudes before the Court decides on its judgment.[238] Dixon justifies this in the context of minorities by providing examples from the Colombian Constitutional Court that granted marital rights to same-sex couples in light of the consistent uproar and demonstrations in favour of the same.[239] Based on this, she identifies certain principles of RJR that court must follow to balance its exercise of power with legal and political legitimacy:

> "(1) Implications that have limited legal support, and no real political justification, will be presumptively illegitimate: by definition, the idea of an "implication" suggests a limited degree of textual support for such a doctrine, and absent any real political justification, this should be sufficient to encourage a court to exercise restraint.
>
> (2) Implications designed to protect the "minimum core" of democracy will generally be legitimate, regardless of the degree of existing legal support for such an implication (or support in the text, history, and structure of a constitution, or a court's prior case law). They will draw their legitimacy from political arguments in favour of courts seeking to respond to an urgent and systemic risk to constitutional commitments to democracy and democratic responsiveness.
>
> (3) Implications designed to counter blind spots or burdens of inertia may also be politically legitimate, but only where they enjoy some meaningful degree of legal support, or are designed to counter a serious and irreversible risk to human dignity, or systemic forms of inertia or state failure".[240]

*First*, the idea of constitutional decisions having to acquire political legitimacy finds its similarities with Carl Von Savigny's conceptions of *Volkgeist*, in essence, the spirit/will of the people guiding the formulation of law.[241] However, just like Savigny, it suffers from similar deficiencies — how is the political legitimacy of a constitutional decision assessed in a country like India?[242] Several decisions tend to involve polycentric issues on which the Indian populace might be divided.[243] For instance, as Dixon herself notes, the populace was divided over the issue of decriminalising non-heterosexual couples, as was the government in power at the time of the judgment. Assessing political legitimacy over issues where a large populace could have multiple views would yield ineffective results if considered as a condition for conducting judicial review.[244] Furthermore, as identified by scholars previously, countries like India lack an adequate constitutional culture, where the society at large barely discusses and engages with constitutional matters of the apex court.[245] Any discussion on the legitimacy of exercising judicial review is inevitably reserved for the upper echelons of socio-political class barriers. Allowing their sole

[238] Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, Vol. 7, STUD. AM. POL. DEV., 35 (1993).
[239] Sentencia C-075/07 (Constitutional Court of Colombia).
[240] Dixon, *supra* note 17.
[241] Théodore Hippert Fri Karl von Savigny, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (Berlin Velt, 1840).
[242] Gavin Sheldon Pais, *Savigny's Idea of Volksgeist in the Indian Legal System*, VOL. 4(2), IJALR (2024) available at https://ijalr.in/wp-content/uploads/2024/01/SAVIGNYS-IDEA-OF-VOLKSGEIST-IN-THE-INDIAN-LEGAL-SYSTEM-edited.pdf (Last visited on January 5, 2026).
[243] Supriyo, *supra* note 19, ¶165.
[244] Savigny, *supra* note 241.
[245] Waldron, *supra* note 6.

judgments, while ignoring the difficulty of ascertaining general political legitimacy in a country with little political legitimacy, could yield unfruitful results that are best avoided.

*Second*, coming back to resolving the conflict between judicial deference and manifest arbitrariness, the requirement of political legitimacy illustrates the hindrance of RJR model to effectively answer the conundrum. While elucidating the integral nature of democratic majoritarian understandings to political legitimacy, Dixon differentiates between two legislative burdens of inertia — one that has received the attention of several groups that the legislature fails to act upon, versus another that constitutes the interest of only one group.[246] For Dixon, the latter might attract lesser legitimacy as opposed to the former, thus inevitably impacting the exercise of judicial review.[247] This might yield unfaithful results in cases that, despite their strong basis in constitutional grounds, remain unheard due to the majority's apathy or opposition to them.

Dixon argues that Navtej Johar is a judgment showcasing a constitutional commitment to equality rather than a response to democratic dysfunction. However, since no serious issues of its political legitimacy existed, considering division among the public and the government's stance, it is argued to be a valid exercise of judicial review.[248] On the other hand, in Same-Sex Marriage the government unequivocally opposed the exercise of judicial review to grant same-sex couples with equal rights as other couples.[249] The Court identified discrimination but fell short of holding it as a clear violation of Articles 14 and 15.[250] Despite the authors indicating the application of manifest arbitrariness, in this case in the same manner as the Court in Navtej Johar, such application would be prevented if the aforementioned grounds of political legitimacy are accepted. The challenge would be not considered simply because it receives the support of only one group while others remain opposed to it, despite the clear constitutional infirmities pointed out.[251] Such understandings would prioritise majoritarian will over constitutional commitments, which as Sindhu suggested, is unviable in a transformative constitutionalist framework.[252] Judgments like Navtej Johar and Joseph Shine have been instrumental in making the distinction between public morality and constitutional morality, holding the latter as crucial for delivering judgments.[253] Following Dixon's model of political legitimacy would be equivalent to upholding public morality to the disadvantage of constitutional morality, a dangerous exercise which could prevent the court from transforming constitutionalism when the legislature fails to do so.[254]

### *C. OVERTURNING THE LOGIC OF 'COUNTERMAJORITARIAN DIFFICULTY'*

The discourse surrounding judicial review, particularly *vis-à-vis* the extent to which courts ought to entrench their powers, has been the subject of debate across several constitutional democracies since its inception. Each scholar has proposed their own solution to the dilemma, and only recently have some taken to address this issue in the context of Global South democracies

[246] Dixon, *supra* note 20.
[247] *Id*.
[248] Raghu Karnad, *Hope for LGBT Rights in India*, NEW YORK TIMES, January 19, 2016, available at https://www.nytimes.com/2016/01/20/opinion/hope-for-lgbt-rights-in-india.html (Last visited on January 5, 2026).
[249] Supriyo, *supra* note 19, ¶42(g) (per Chandrachud J.).
[250] *Id*., ¶¶154, 155 (per Bhat J.).
[251] Dixon, *supra* note 20.
[252] Sindhu, *supra* note 212.
[253] Navtej, *supra* note 102, ¶640.3.7; Joseph Shine, *supra* note 101, ¶171.
[254] *Id*.

across Asia and other continents.[255] Despite the present submission intending to contribute to such widely engaged in discourse, not only have few observed the dilemma of judicial review in the context of the two conflicting doctrines. Academics focusing on the Global South have also failed to address the frailties present in Dixon's RJR model, which hinder the consistent application of judicial review in multicultural societies with more proactive forms of constitutionalism, such as India.

However, the authors propose that these identified inadequacies, although novel to the model, stem from broader ideas that have pervaded the scholarly literature on this issue over decades. Such ideas have not only entrenched themselves as dominant epistemes of analysing judicial review, but have sufficiently excluded any other viewpoint that may arise from a more genuine understanding of Global South democracies. Hence, in this section, the authors propose their solution to counter the inadequacies of Dixon's model, making it more suitable to serve the needs of Indian constitutionalism. Additionally, they identify the impact of dominant epistemes from the Global North that, when imposed on Global South democracies, have yielded unfaithful results like the conflict between deference and manifest arbitrariness. Thus, the authors intend to challenge the dominance of epistemes that are inevitably reflected in Dixon's RJR model from an Indian, and potentially, a Global South perspective. This translates to expounding a theory and method of judicial review beyond its originally identified contours to establish new contours customised to serve Global South constitutional democracies via satisfying the authors' original query of resolving doctrinal conflicts.

### 1. (DIS)ABILITY OF THE RJR MODEL TO OVERTURN THE SCHOLARLY STATUS QUO

In *Marbury* v. *Madison*, the finding of the power to declare laws as unconstitutional was treated with hostility and created severe backlash from academics such as Thayer, who proposed a narrow perception of courts' powers.[256] To Thayer, who in this exercise laid down the tenets of judicial deference, held that the political and legislative process was the key factor to any democracy, and the courts' right to adjudge on the constitutionality of laws was viewed as overruling the people's will.[257] Thayer believed that the duty to assess constitutionality of legislation, alongside interpreting and implementing constitutional commitments lay with the legislature through the form of policy making.[258] Thus, judicial deference was brought forth to protect democracy and the legislative process as a core value, which would protect other values.

Hence, for a long time, the literature on judicial review and judicial deference laid excessive significance on the protection of democracy as a core value, and on reinforcing any other constitutional value through the medium of democracy and the legislative process.[259] This has led to the creation of a hierarchy between democracy and constitutional values, where the latter's interpretation lies in the hands of the legislature. While the two are being read by scholars as mutually exclusive values operating in different domains, their focus on preserving the former over the latter establishes the 'dominance' of democratic values over constitutional values. The checks

[255] Daniel Bonilla Maldonado, *Introduction: Towards a Constitutionalism of the Global South* in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA, 1 (Daniel Bonilla Maldonado ed., Cambridge University Press, 2013).
[256] Marbury v. Madison, 5 U.S. 137 (1803) (United States Supreme Court).
[257] Thayer, *supra* note 53.
[258] *Id*.
[259] Ackerman, *supra* note 183.

and balances to such power of democracy would remain in the electoral process should the legislature exercise any excessive powers.[260] The courts' job, as generally viewed, is to reinforce and preserve this model of democracy. Thus, courts engaging in a judicial review exercise instead of deferring to the legislature was viewed as a counter-majoritarian difficulty meant to take away such power of check and balance from the people.[261] However, as identified by recent literature, such difficulty is no longer limited to the courts but has exceeded beyond that by becoming a feature which ails the legislative process as well. This has demonstrated the failure of democracy and the legislative process to keep itself in consonance with other constitutional values and to protect them.

Scholars, especially across Global South jurisdictions, have identified the failure of legislatures, bodies meant to represent the democratic majority, to fulfil their purpose.[262] Instances of democratic backsliding have also been reported more than earlier, indicating the dysfunctions of the legislative process.[263] Such dysfunctions lead to a 'reverse' counter-majoritarian difficulty where the legislature and the legislative process fail to represent the people in their complete form, subverting constitutional values.[264] Such reasons substantially prove the unviability of democracy on its own to protect constitutional values. Thus, Thayer's conceptions of judicial deference run on an assumption of democratic efficiency, which stands subverted in countries like India. This makes the complete application of his theory unviable in such jurisdictions, and must be relaxed to counter dysfunctions across constitutional values in contemporary times. In other words, it becomes the Court's role to exercise greater review of actions that potentially create such dysfunctions. To one comprehending such literature, it seems evident that such a task of judicial review must be conducted by reinterpreting the hierarchy between democracy and other constitutional values to hold them at par with each other, where the enforcement of the latter is not completely dependent on the former. If the legislature fails to protect and preserve constitutional values via exercising democratic power, the task should ideally fall upon the courts to protect such values independent of democratic understandings.[265] This leads to Thayer's judicial deference approach not being utilised by the court, where such an approach is unable to yield constitutionally desirable results.[266]

However, the issue arising with the RJR model is the limited answer it provides to upholding constitutional commitments. As mentioned above, Dixon's focus on judicial review's purpose is for courts to engage in democratic responsiveness rather than the protection of constitutional values, which might not be completely protected by the values of democracy and

[260] Bickel, *supra* note 187.
[261] Ely, *supra* note 61.
[262] Richard H Pildes, *Courts and Democracies in Asia*, Vol. 16(2), INT. J. CONST. L., 682–685 (2018); Landau, *supra* note 14.
[263] Ely, *supra* note 61; *See generally* Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14(1), LAW & ETHICS HUM. RTS. 49, 60, 66–67 (2020) (Khaitan argues how the current ruling party in India's tenure counts for assaults on democratic and good governance, which is what he calls as democratic backsliding); Emilio Peluso Neder Meyer, CONSTITUTIONAL EROSION IN BRAZIL (Bloomsbury Publishing, 1st edn., 2021); Stephan Haggard & Robert Kauffman, *The Anatomy of Democratic Backsliding*, Vol. 32(4), J. DEMOCR., 27–41 (2021).
[264] *Id.*
[265] Daniel Bonilla Maldonado, CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA (Cambridge University Press, 2013).
[266] Thayer, *supra* note 53.

the legislative process.[267] This justifies her focus on the *sine qua non* over judgments carrying political legitimacy, while preventing a situation that may create a democratic backlash. Since she also seems to rely on judicial review protecting thicker understandings of democracy in certain instances, such thick understandings seem to include other constitutional values, such as rights-based commitments, only to the extent they engage in issues of democratic participation and deliberation.[268] Such values, to the RJR model, are irrelevant when they do not engage in such issues of participation and deliberation, nor is it the Court's role to protect such values. This seeks to endure the *status quo* hierarchy between democracy and constitutional value, where the Court's focus according to Dixon is on protecting the former.[269] A similar approach is seen in the dichotomy between R.K. Garg and Electoral Bonds. Only because Electoral Bonds dealt with issues of democracy did the Court decide not to follow the lines of judicial deference. However, as observed in Part III, the same was not the former's fate.[270] Hence, what is evident is that despite the failure of judicial deference to answer issues of dysfunction in constitutional values, the logic of judicial deference to protect democracy above everything else continues to be upheld. Despite the problems identified with judicial deference failing to uphold constitutional values, such problems are only partially answered, while the prevailing logic of hierarchy that powers Thayer's judicial deference continues to exist.[271] Such an understanding of judicial deference, the authors argue, when applied in the Indian context retains the conflict between judicial deference and manifest arbitrariness in factually similar situations. It allows the courts to be only 'democratically responsive' as opposed to being 'constitutionally responsive', despite the latter being an inherent necessity in Global South constitutional democracies.[272]

### 2. THE NEED FOR A 'GLOBAL SOUTH' MODEL

Such a hierarchy of values for judicial review, protecting democracy over other constitutional values, and subsequently, the application of judicial deference in cases involving constitutional values finds its origins in a constitutional structure that hails from Global North democracies.[273] As David Landau, recognises, Global North democracies delegate the flourishing of constitutional values to political spheres rather than the judiciary since they share three known features that distinguish them vastly from their counterparts in the South:

> "i) presence of an active constitutional culture among the people, allowing the legislative process to act based on constitutional values; ii) a rigid separation of powers system, such that any matter on which issues of policy concerns may arise is purely the legislative or executive domain; iii) the lack of a provision for judicial

[267] Dixon, *supra* note 20.
[268] *Id*.
[269] *Id*.
[270] *See supra* Part III, on "Inconsistent Reasonings for Inconsistent Decisions: Fallacies in the Application of Judicial Deference and Manifest Arbitrariness".
[271] Stephen Gardbaum, *Reassessing the new Commonwealth model of constitutionalism*, Vol. 8(2), INT. J. CONST. LAW, 167–206 (2010).
[272] Sindhu, *supra* note 212; Michael Perry, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS, (Cambridge University Press, 2007).
[273] Samuel Issacharaoff, FRAGIE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (Cambridge University Press, 2015).

> review of State action in the constitution, particularly in the context of the United States from which most of the judicial review scholarship originates".[274]

These features create an assumption of legislative competence to deal effectively with matters of policy-making without violating constitutional understandings.[275] Coupled with a lack of textual basis for judicial review, it is assumed that the Court's purpose becomes to only facilitate such an exercise of democracy and legislative process without hindering it, leading to a deferential attitude by courts.[276] Thus, a faithful exercise of judicial deference and a rigid difference of judicial versus legislative powers is assumed to operate on these factors.

However, such features do not exist in Global South democracies, especially India, as the authors' case is here, because of i) the absence of a constitutional culture with the people and the legislature, evident in the subsequent dysfunctions that evolve; ii) a relatively relaxed formulation of separation of powers than the conventional framework, allowing judiciary to engage in matters that might be in policy domain; and iii) the textual basis provided to judicial review in the Constitution,[277] as is explained below. Though Landau has already highlighted such factors in his work, the authors aim to exemplify his argument from the Indian perspective to argue against the application of rigid ideas of restraint that current scholarship, including the current RJR model, seeks to entrench.[278] This would subsequently lead to the relaxation of judicial deference as a doctrine to satisfy the needs of Indian constitutionalism, thereby resolving the identified conflict.

Judicial deference inherently functions on the assumption that the legislature aligns itself with constitutional values to produce substantively just outcomes, as suggested by Waldron.[279] Such alignment would be considered as the presence of a vibrant constitutional culture in the legislative and political process to deal adequately with constitutional values. However, as ironically identified by Dixon herself, issues of democratic backsliding have escalated in Global South democracies like India, preventing constitutional values from being upheld in these democracies themselves.[280] To elucidate from India's example, Landau identifies that the SCI's evolution of public interest litigation stems from the legislature's inability to implement constitutional goals, including its implementation of guaranteeing the right to food.[281] This has required SCI to be more interventionist in its approach.

Likewise, on several occasions, Parliament sessions have been suspended prematurely or have led to little to no fruitful legislative deliberation on the enactment of crucial laws.[282] Scholars like Khaitan identify that one of the reasons for the same could potentially be the

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[274] Landau, *supra* note 17.
[275] *Id*.
[276] Rosalind Dixon, *Democratic Theory of Constitutional Comparison*, Vol. 56(4), AM. J. COMP. L., 947 (2008); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, Vol. 59, STAN. L. REV.,131 (2006).
[277] Landau, *supra* note 17.
[278] Dixon, *supra* note 20.
[279] Waldron, *supra* note 6.
[280] Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, Vol. 14(1), LAW & ETHICS HUM. RTS. 49, 60, 66-67 (2020); Dixon, *supra* note 20.
[281] Landau, *supra* note 17.
[282] Jahnavi Sindhu & Vikram Aditya Narayan, *A Case for Judicial Review of Legislative Process in India*, WORLD COMPARATIVE REVIEW (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4420231 (Last visited on January 5, 2026).

publicisation and broadcasting of parliamentary debates with the growth of technology, increasing the frequency of disruptions.[283] Not only does this facilitate parliamentary inertia to undertake legislative action, but it also leads to laws being passed in the middle of disruption without adequate debate.[284] Despite the impact that such legislation might have on constitutional values, any debate on it is hindered. Such factors hinder the legislative process' ability to respond to implementation of constitutional values.

Similarly, addressing the issue of separation of powers and the subsequent positionality of judicial framework, it has been addressed in several cases that the paradigm set in India is not rigid.[285] On the contrary, the Indian separation of powers but been more fluid with each organ of the government exercises several kinds of functions beyond their purported conventional function.[286] This is done with a view to respond to the needs of a parliamentary system meant to ensure government accountability.[287] Courts in Global South, such as that of South Africa and India, have been identified to abide by a 'transformative constitutionalism' framework, where newer versions of constitutional values evolve with changing times, taking a living tree approach that must be upheld for the constitution's healthy sustenance in such democracies.[288] This has led to courts moving beyond the rigid separation of powers paradigm to uphold such evolution.[289]

Courts have also been sought to uphold institutional accountability of the legislative process in several occasions, should they fail to preserve constitutional values. To elucidate, Article 13(2) provides for post-constitutional legislations to be declared void should they be found inconsistent with the Constitution.[290] This has been held as recognising a textual basis for judicial review of legislations to preserve constitutional commitments.[291] Similarly, unlike other constitutions, the Indian Constitution specially provides for the SCI to provide its judgments in a way that ensures "complete justice" for both parties.[292] Though such an article was passed without muster in the Constituent Assembly, in the debate over Article 136, Alladi Krishnaswami Ayyar mentioned the right of SCI to "develop its own jurisprudence" to cater to the needs of the country.[293] This indicates not only the magnitude of responsibility conferred on the Court by the constitution framers, but also their intention not to stick to rigid manifestations of the separation of powers paradigm, allowing the Court to be more proactive in its exercise to ensure faithfulness

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[283] Tarunabh Khaitan, *The Real Price on Parliamentary Disruptions*, Series No. 42/13, OXFORD LEGAL STUDIES RESEARCH PAPER (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2215859 (Last visited on November 20, 2025).

[284] Sindhu & Narayan, *supra* note 282; Indian Hotel Restaurants Association v. State of Maharashtra, (2019) 3 SCC 429.

[285] Ruma Pal, *Separation of Powers* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, 2016) (The author herein identifies how each organ, for instance, the legislature, also performs executive and judicial functions of its own, with the objective to ensure accountability).

[286] *Id*.

[287] *Id*.

[288] K.E. Klare, *Legal Culture and Transformative Constitutionalism*, Vol. 14(1), SAJHR (1998).

[289] *See* Manoj Narula, *supra* note 219; Navtej, *supra* note 101, ¶609–617; Electoral Bonds, *supra* note 12, ¶¶43, 242, 215; Fourie, *supra* note 20.

[290] The Constitution of India, 1950, Art. 13(2).

[291] Anwar Ali Sarkar, *supra* note 10.

[292] The Constitution of India, 1950, Art. 142.

[293] CONSTITUENT ASSEMBLY DEBATES, Volume No. 8, June 6, 1949, *speech by* ALLADI KRISHNASWAMY AYYAR, 639, available at https://eparlib.sansad.in/bitstream/123456789/763239/1/cad_06-06-1949.pdf (Last visited on January 5, 2026).

to the Constitution. In Global North democracies, scholarship has sought to challenge the notions of constitutional courts playing a guardian role.[294] In India, however, such power of SCI has found express references for its application.[295]

Based on this, the authors return to the discussion on the issues with Dixon's model, alongside the larger, more important conflict of judicial deference versus manifest arbitrariness. It is suggested that the inherent issues with them arise out of the common dominant episteme, upholding the hierarchy of democracy as a value above other values. This operates under the assumption that upholding democracy would allow other values to progress and be implemented at their own pace. Dixon's focus on judicial review countering only 'democratic dysfunction', alongside the focus on such exercise of review being informed by majoritarian understandings, assumes that the majority would want to implement constitutional values, and ought to be left with the task of doing the same.[296] Such understanding does not consider the absence of this underlying assumption in the absence of a strong constitutional culture and a fluid separation of powers model. While the authors recognise the importance of limitations on the court's powers to prevent a complete judicialisation of politics,[297] there can be two problems with the same. *Firstly*, such limitations cannot be applied in the same form and magnitude as they exist for constitutional democracies surrounded by different contexts. *Secondly*, Dixon seems to conflate ideations of legitimacy and competence with abiding by the democratic majority's choices, such as those of the legislature.[298] Unfortunately, such issues are also seen with the attitude of the SCI and other courts in India that seek such an application of judicial deference. As argued above, Dixon's approach is reflected in the analysed cases to retain the conflict between judicial deference and manifest arbitrariness. However, it also suggests that the present interpretation of deference to the legislature, while not suitable to the Indian context, should still be applied in the adjudication of Indian constitutional matters. This is made clear when Bhagwati J. applies US jurisprudence on economic legislation to uphold the deferential attitude on striking down such legislations, without ever questioning the applicability of such jurisprudence to India.[299] The US jurisprudence on the issue arises from a conception of judicial deference that is compatible to its own context. As established by the authors, the same cannot be directly applied in the Indian context without considering the nuances the Indian constitutional design originates from. Thus, the cases cited by him reflect the same logic of deference critiqued by authors to be incompatible with Indian constitutional design. Similarly, the Court's wide brush approach in Foundation for Media Professionals operates on the conception that the executive shall ensure fulfilment of constitutional values to the extent possible, a myth in democracies like India, which the authors have dispelled by now.[300] Yet, such ideas of deference continue to be upheld by scholarly literature on judicial review, alongside the constitutional courts in the form of dominant epistemes, that must be uprooted to allow alternative epistemes to suit the Global South democracies in their own context.

Hence, the authors submit that such ideations of judicial deference have been applied to Global South democracies like India without gauging the context at hand. This

[294] Thayer, *supra* note 53.
[295] *See* Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 25.
[296] Dixon, *supra* note 17.
[297] Ran Hirschl, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (Harvard University Press, 2007).
[298] Dixon, *supra* note 20.
[299] RK Garg, *supra* note 72, ¶8.
[300] Foundation for Media Professionals, *supra* note 167, ¶20.

diminishes their fruitfulness in upholding constitutional values and becomes a major reason for the inconsistency in judicial review. Their inapplicability to Global South constitutionalism, and thereby, the Indian framework, requires the formulation of a new model of review. Its purpose would be to provide an alternative which adopts the balance between the arising inconsistency of judicial deference and manifest arbitrariness, similar to the RJR model. However, such a model must also not shy away from recognising the Courts' power to uphold constitutional commitments arising out of given contexts, where applying deference in its currently envisaged form of abnegating to engage in a judicial review does not hold consonance with such commitments.[301] Hence, the authors propose an alternative solution that seeks to deviate from the existing literature on judicial review, in favour of one more amenable to contexts like that of India, and ultimately capable of bringing about consistency in the conflict of judicial deference and manifest arbitrariness.

### *D. REMEDIES AND SOLUTIONS*

In this Part, the authors identify the proposed model they sought to apply to address and remedy the loopholes arising from the present literature and Dixon's model. This would make it suitable to resolve the identified conflicts. This is done by proposing a 'dynamic theory' to the role meant to align itself with constitutional commitments. Subsequently, the authors argue for exploring newer, more unconventional ways of understanding and applying judicial deference when found to be in conflict with such constitutional commitments, as exists in the present conflicts of deferring with the legislature or declaring legislations as manifestly arbitrary.[302] While borrowing from Dixon's model to serve this purpose, it would also satisfy issues of legitimacy and any other concern that may arise by undertaking such a model of review.

#### 1. RESPONDING TO CONSTITUTIONAL DYSFUNCTIONS: A WIDER CONCEPTION OF THE RJR MODEL

The four identified conflict situations in Part III have demonstrated instances where manifest arbitrariness could have been applied to uphold constitutional commitments, but the Court strayed away from the same by adopting the limited understandings of judicial deference as discussed in the above sub-section. Despite the strength of extant literature on the significance of democratic process *vis-à-vis* judicial review, there have been scholars critiquing its dominance. Perry and Dworkin have identified the importance of rights-based protections as constitutional commitments that the court must put forth in its judicial review exercise.[303] Similarly, scholars like Landau have argued the inapplicability of restraint-based scholarship, arguing for the formulation of more dynamic models of judicial review that address the situation adequately.[304]

However, even such scholars have undertaken such an exercise in a limited manner, with a greater focus on democratic understandings above other factors. For instance, Landau argues that such a dynamic theory of judicial review involves, *firstly*, questions of plausibility, or

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[301] Gautam Bhatia, *Judicial Evasion, Judicial Vagueness, and Judicial Revisionism: A Study of the NCT of Delhi vs Union of India Judgment(s)*, SSRN (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637009 (Last visited on January 4, 2026).
[302] Tushnet, *supra* note 216.
[303] Compare Thayer, *supra* note 53, with Perry, *supra* note 272; *See also* Ronald Dworkin, TAKING RIGHTS SERIOUSLY (Bloomsbury Publishing India, 2013)
[304] Landau, *supra* note 20.

whether it is politically feasible for judges to play a role in improving political institutions over time; and *secondly*, the questions of democratic impact, or whether a given intervention might have a net-negative impact by undervaluing democracy.[305] Hence, though the focus on plausibility and impact of judgments on issues of democracy and judicial competence is legitimate, the authors propose that the exercise of judicial review cannot be limited to only these factors. Instead, there must be an active effort to imbibe further values that guide judicial review. Here, the authors espouse their own models of review to bring about the desired consistency in it.

The model of review ought to be more dynamic, as Landau suggests, to respond to the needs of the Global South, and in this case, India specifically, as a constitutional democracy where assumptions for the application of certain doctrines do not exist. It requires the courts to not only engage in democratic responsiveness but also 'constitutional responsiveness', in essence, to assess the impact of a judgment in upholding/ not upholding constitutional commitments.[306] Instead of simply focusing on pushing forth democracy as a constitutional value, judicial review must undertake the task of preserving and implementing constitutional values based on the relevant 'constitutional morality' of that time.[307] To elucidate, in Jaya Thakur, even if the Parliament had the main control under Article 324 to make laws on the appointment of Election Commissioners, the presence of powers would not negate the condition of independence and impartiality of such commissioners.[308] If not implemented, the impacts could be severe, not only in the degree of control (or the supposed lack thereof) of the legislature over guarantor institutions like the commission, but also the impact on the free and fair nature of mankind's greatest ever election exercise to be conducted.[309] This would seek to implement Dixon's RJR model based on placing judicial review in its context, allowing the court to respond to dysfunctions, but such dysfunctions are not only democratic in nature. Thus, such a model aligns with the constitutionalist understandings of constitutional courts in India, undertaking a more proactive role than their counterparts in other democracies, substantially resolving the issue also identified by Sindhu in her critique of the RJR model's applicability.

Hence, even judicial deference has to be substantially amended in the surrounding context. As mentioned previously, since the doctrine of judicial deference carries significance in a constitutional democracy like India, albeit in a newly-found manner, it would still hold legitimacy as a ground to refrain from certain exercises of judicial review.[310] However, to ensure such exercise of deference does not tantamount to what Bhatia would call 'judicial abnegation' — where the Court refuses to exercise its obligations — the Court must undertake an approach of inquiring into the plausibility of applying such a doctrine as well.[311] In other words, the Court must assess what the impact on constitutional commitments would be if judicial deference prevents it from

[305] *Id*.
[306] Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, Vol. 7(1), INT'L J. CONST. L., 106 (2009).
[307] Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1, ¶¶289, 357.
[308] Jaya Thakur, *supra* note 19.
[309] Tarunabh Khaitan, *Guarantor Institutions*, Vol. 16(1), ASIAN J. COMP. LAW, 40–59 (2021).
[310] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, ¶99.
[311] Gautam Bhatia, *The Supreme Court's 4G Internet Order: Evasion by Abnegation*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 11, 2020, available at https://indconlawphil.wordpress.com/2020/05/11/the-supreme-courts-4g-internet-order-evasion-by-abnegation/ (Last visited on January 4, 2026).

intervening in a matter of constitutional importance.[312] This would mean informing the understanding of the concept and applicability of judicial deference by constitutional understandings (in contrast with Dixon, who argued for legitimacy to be informed by democratic majority understandings), where the intent of applying judicial deference ought to be in seeking harmony within constitutional commitments rather than creating conflicts between them, as seen above. This allows a flexible application of the doctrine based on contextual surroundings, thereby recognising the transformative role of the Court in evolving the doctrine to satisfy the needs of today.[313] As will be argued subsequently, such conceptions would bring about consistency in the exercise of judicial review, resolving the conflicts that have arisen until now.

However, the issues with such a model would attract the same question as that of Dixon — how would the court tackle issues of reverse burdens of inertia or democratic backlash if the court does not stick to majoritarian understandings while conducting a judicial review exercise?[314] In other words, how does the court implement its judgments effectively while going against the Parliament and the larger polity's understandings?[315] This is done by examining Dixon's theorisation of formulating remedies to bring about a balance between conflicting conceptions of democracy and issues of legitimacy through a weak-strong form of review.[316] Such an argument is used to dynamise the applicability of judicial deference, allowing it to exist albeit in an unconventional manner that would create a balance between issues of judicial competence while allowing courts to uphold their transformative nature through applying doctrines like manifest arbitrariness. This could be by the formulation of different forms of remedies which would evolve how the authors imagine and apply the two doctrines, allowing them to operate harmoniously. This is the resolve that authors wish to undertake for reconciling the two doctrines.

### 2. Strong Courts, Weak Remedies: A Case for Weak-Strong Remedies in India

Dixon identifies that courts generally undertake two forms of remedies while conducting judicial review, in the form of weak and strong remedies.[317] 'Strong' remedies are considered so generally by virtue of their largely irreversible nature, where the courts propound to take stricter forms of action against the legislature based on violation of constitutional or democratic commitments.[318] On the other hand, 'weak' remedies are typically indicative of the deference towards the legislature, allowing more lenient, reversible forms of action that the legislature can easily overturn based on findings of what it deems to be sufficient.[319] The two arise from the same dichotomy of upholding versus limiting the exercise of power on matters outside of competence. Since Dixon seeks to propose a more balanced form of review that accounts for responsiveness alongside legitimacy, she suggests that courts merge the two into weak-strong

[312] The Supreme Court in the past has exercised judicial deference without noticing the impact created on constitutional commitments. For instance, *see* C.f. Supriyo, *supra* note 16, ¶165.
[313] Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts (HarperCollins Publishers, 2019).
[314] Dixon, *supra* note 20.
[315] Velasco Rivera, *On Dixon's Responsive Theory of Judicial Review: How Responsive can the Responsive Model Be?*, Vol. 34(2), Nat. Sch. Ind. Rev. (2023).
[316] Eric Maskin, *On the Rationale for Penalty Default Rules*, Vol. 33(3), Fla St. U. L. Rev., 1 (2006).
[317] Dixon, *supra* note 20.
[318] Tushnet, *supra* note 216.
[319] Gardbaum, *supra* note 271.

forms of review where the court remains responsive, but defers to the legislature on matters when rendered necessary.[320] This primarily arises from a "bounded-deliberative" model, or a dialogic form of judicial review where the Court espouses its own understandings but seeks the legislature's contribution on the same, considering the significance of its role in the matter.[321] This would generally occur in cases involving polycentric issues where the Court has been considered as not competent to answer all issues on its own.[322]

Such a dialogic form of judicial review has sought to be applied in India, albeit in a few cases only. The Court engaged in a semi-dialogue with the legislature in *State of Rajasthan* v. *Vishakha* when it sought to apply guidelines framed under Article 32 until a law was formed.[323] These guidelines led to the creation of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and amendments to criminal law from the legislature's end, indicating an engagement between the two institutions.[324] Similarly, in issues surrounding the constitutionality of tribunals, in several landmark cases such as *Sampath Kumar* v. *Union of India* ('Sampath Kumar'), the Court has argued against the constitutionality on certain grounds, but has requested legislature to make certain changes to make them constitutional.[325] Hence, its applicability is not new to Indian constitutionalism, but requires further exploration in newer contexts.

The conflict between judicial deference and manifest arbitrariness, coupled with the inconsistency in conducting judicial review, arises from the fact that neither courts nor the legislature is fully competent to deal with issues. Despite the SCI taking a black and white approach in framing remedies of simply declaring legislative action/inaction unconstitutional versus not taking any action, it has recognised the polycentricity of several issues that arise in landmark constitutional jurisprudence.[326] Hence, despite the role of upholding constitutional commitments being vested with the courts, legitimate issues of competency arise since the court is not fit to deal with the intricacies of certain matters that the legislature would be capable of. For instance, though the Court in the Same Sex Marriage case ought to have upheld the constitutional commitments to equality, holding it to be violated in the case of same-sex couples facing discrimination, it could not have formulated provisions to create marital and adoption legislations for their purpose.[327] This would require essential legislative functions to be exercised.[328] Hence, the onus falls on the courts to engage in dialogue with the legislature through the formulation of

[320] Dixon, *supra* note 20; Brian Ray, ENGAGING WITH SOCIAL RIGHTS: PROCEDURE, PARTICIPATION AND DEMOCRACY IN SOUTH AFRICA'S SECOND WAVE (Cambridge University Press, 2016).
[321] Chiara Valentini, *Deliberative Constitutionalism and Judicial Review: A Systemic Approach*, Vol. 47, VISIONS OF CONSTITUTIONALISM: INSTITUTIONS (2022), available at https://doi.org/10.4000/revus.8030 (Last visited on January 4, 2026).
[322] Supriyo, *supra* note 19, ¶165.
[323] *See generally* Vishakha v. State of Rajasthan, (1997) 6 SCC 241.
[324] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; The Criminal Law (Amendment) Bill, 2013.
[325] S.P. Sampath Kumar v. Union of India, (1985) 4 SCC 458, ¶3.
[326] Supriyo, *supra* note 19, ¶165.
[327] *Id*.
[328] Delhi Laws Act, 1912, In Re, 1951 SCC 568, ¶442.

such remedies, making the constitutional structure more adept in dealing with constitutional issues like these.[329]

However, the argument does not simply end there. Applying such newer, alternate forms of remedies not only creates a balance, but it also continues to apply judicial deference in matters where necessary. However, such deference no longer becomes an absolute *carte blanche* to evade matters of constitutional significance (like the Court did in Jaya Thakur) but gets applied in newer versions to uphold some integrity in the separation of powers paradigm. This would prevent judicial hegemony and 'hegemonic preservation' by courts from arising, while also dealing with issues of reverse burdens of inertia or backlash when the legislature is provided enough bandwidth to skilfully deal with polycentric issues.[330] Thus, judicial deference is employed in formulating remedies.

As a constitutional polity, the focus becomes on courts to adopt newer, alternate forms of judicial review when existing applications of doctrines stop being consistent and conventional forms of it yield undesirable results. Moreover, such newer forms can only be ingrained in an acceptable judicial review model if sought to be legitimised in the context of the given constitutional framework. Though the authors have sought to bring such legitimacy to the judicial review model proposed above, to implement unconventional forms of remedies in the form of dialogic review and the like would involve finding a constitutional basis for them, as well as pinpointing instances where such remedies ought to be explored. In brief, the exercise seeking to bring consistency in judicial review ought to be legitimised for its consistent and uniform application. Though there are several forms of remedies that may exist which ought to be legitimised in their given context, the authors will illustrate this by means of one such weak-strong form of remedy, in the name of suspended declaration of invalidity.[331] By highlighting the legitimacy it derives from the Indian constitutional design, coupled with its supposed threshold for application, the authors would subsequently apply it to the conflicts identified above, exemplifying its ability to resolve existing conflicts. Through this, the authors seek to revolutionise understandings of judicial review in Indian and even Global South constitutionalism beyond its purported scholarly and jurisprudential understandings, to serve the context of contemporary times.

In short, lastly, the following is the proposed model of questions that are integral to the authors' exercise of a dynamic form to the RJR model: *firstly*, assessing the circumstances in which a judgment is situated, and the issues arising therein; *secondly*, identifying the supposed impact of the issue on constitutional commitments and depicting the legislative failure to uphold them; *thirdly*, the impact of applying judicial deference on matters of legislative competence on the integrity of constitutional commitments, while simultaneously ensuring that such deference is flexible to be informed by constitutional understandings of the Court's role; and *lastly*, in cases involving a conflict between deference and constitutional commitments, creating a balance

[329] Jurgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (*translated by* William Rehg, MIT Press, 1996).

[330] Hirschl, *supra* note 297. (Hirschl argues how constitutional courts seek to preserve their own hegemony by judicialising politics and intervening in matters that do not fall in their domain to their benefit).

[331] Re Manitoba Language Rights, [1985] 1 SCR 721, 19 DLR (4th) (Supreme Court of Canada) (usage of this declaration in Canada); Fourie, *supra* note 20 (usage of this declaration in South Africa).

between the two entities using weak-strong forms of review, while legitimising and entrenching such forms of review to serve the given purpose.

## V. SUSPENDED FINDING OF UNCONSTITUTIONALITY

The previous Part presented a viable framework for judicial review that harmoniously integrates the doctrines of judicial deference and manifest arbitrariness. However, how this framework could be justifiably applied within the context of Indian jurisprudence, in accordance with the Constitution, remains an unanswered question. Before moving ahead, it is imperative to clarify that the authors do not seek to propose this remedy as the only way through which the framework could be applied, as will be evident from Part VI, but rather as an indication of one of the many ways through which the framework could be applied.

Many foreign jurisdictions, like Canada and South Africa, deal with this dilemma using a remedy called a Suspended Declaration of Invalidity ('SDI').[332] Simply put, an SDI is employed by the courts when they suspend the invalidity of a law and give a fixed amount of time to the legislature to enact a new law which cures the defects present in the old one, until which the old law remains operational.[333] If the legislature fails to enact such a law within the provided time, the declaration of invalidity automatically kicks into effect, and the law is purported to be unconstitutional.

For instance, in South Africa, this remedy emerged from the landmark judgment in *Minister of Home Affairs and Another* v. *Fourie and Another* ('Fourie'),[334] wherein the Supreme Court of South Africa suspended the declaration of invalidity of the South African Marriage Act for one year, giving the government time to remedy the defects, failing which the law would be struck down.[335]

However, as has been highlighted by scholarly opinion, an SDI, as it is used in other jurisdictions, cannot be used in India due to the presence of an additional roadblock with respect to how laws violative of fundamental rights are to be treated here.[336] This roadblock comes into play in terms of Article 13(2) of the Constitution,[337] under which it has been argued that the power of the SCI to strike down a law turns into a 'duty' to strike down the same upon its finding as unconstitutional and the law is held to be 'null' from the start. More on this roadblock has been discussed in sub-part B. [338] Due to that, the authors propose that a remedy called a Suspended Finding of Unconstitutionality ('SFU') would work best in India.

An SFU, while heavily inspired by the SDI, would involve suspending the finding of unconstitutionality of a law on grounds of a fundamental rights violation for a certain period of

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[332] *Id*.
[333] Serafin, Riccardo, *Suspended Declarations of Invalidity: A Comparative Perspective*, Vol. 17(1), J. COMPAR. L., 115 (2022).
[334] Fourie, *supra* note 20, 102, 103.
[335] *Id*.
[336] Hardik Choubey, *The Equal Marriage Case and a Suspended Declaration of Invalidity – A Response*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, July 9, 2023, available at https://indconlawphil.wordpress.com/2023/07/09/guest-post-the-equal-marriage-case-and-a-suspended-declaration-of-invalidity-a-response/ (Last visited on January 5, 2026).
[337] The Constitution of India, 1950, Art. 13(2).
[338] *Id*.

time. During this period, the legislature would be required to amend the law to address its constitutional defects. The differences between SDI and SFU, particularly in the context of Indian constitutional law, are explored below in sub-part B. However, it is important to first understand why such a remedy is needed in the Indian legal framework, given the limitations of Article 13(2) of the Constitution.

### *A. THE NEED FOR SFU: ADDRESSING PRACTICAL CHALLENGES, LEGISLATIVE GAPS, AND SEPARATION OF POWERS*

Three reasons necessitate a remedy like SFU in case a law is found to violate fundamental rights. *Firstly*, to prevent a *void ab initio* ruling from ensuing a practical chaos concerning the actions already done under the law. *Secondly*, to prevent a legislative gap from forming. *Lastly*, an SFU will uphold the principle of separation of powers as enshrined in the Constitution, sticking to the continued application of judicial deference in a modified format.

In India, the doctrine of prospective overruling, whose use is now a settled practice in Indian Courts,[339] originated in the *Golak Nath* v. *State of Punjab* in the context of unconstitutional constitutional amendments.[340] In that case, Subba Rao J. remarked that a retrospectively operational ruling "would introduce chaos and unsettle the conditions in our country".[341] A similar situation arises if a law that has been present and has been in regular use for a considerable period of time is found to be unconstitutional. For instance, the SCI in Shayara Bano held the Muslim Personal (Shariat) Application Act, 1937 as manifestly arbitrary insofar as it recognised triple talaq and thus held void to that extent under Article 13(1).[342] This essentially implied that all divorces that took place as per this law after the coming into force of the constitution would be invalid.[343] However, the same is not the case, and the women who were divorced using triple talaq were left in a state of limbo as to whether they stood divorced or not.[344] Thus, while a law can certainly be held unconstitutional on grounds of violation of fundamental rights, there is certainly a chance that the same would lead to many practical difficulties for those who were affected by the law.

The SCI realises this, and this was also one of the reasons why it refrained from holding the SMA unconstitutional.[345] The SMA is a positive law conferring marriage rights to people irrespective of their religion. Since 1954, when it was enacted, a massive number of marriages have taken place under SMA and holding it unconstitutional and void would have invalidated all those marriages.

As discussed previously, another consequence of declaring a law void would be the creation of a legislative gap since there would be no law which would immediately cover the

[339] Waman Rao v. Union of India, (1981) 2 SCC 362, ¶32; Indra Sawhney, *supra* note 64.
[340] Golak Nath v. State of Punjab, 1967 SCC OnLine SC 14, ¶53 (per K. Subba Rao, C.J.).
[341] *Id*., ¶8.
[342] Shayara Bano, *supra* note 10, ¶104.
[343] THE LEAFLET, *SC ruling against Triple Talaq practice operates retrospectively: J&K HC*, August 24, 2021, available at https://theleaflet.in/supreme-court/sc-ruling-against-triple-talaq-practice-operates-retrospectively-jk-hc (Last visited on October 8, 2025).
[344] Neyaz Farooquee, *Triple Talaq: India Muslim Women in Limbo After Instant Divorce Ruling,* BBC, September 14, 2022, available at https://www.bbc.com/news/world-asia-india-62805107 (Last visited on October 8, 2025).
[345] Supriyo, *supra* note 19, ¶85.

subject matter governed by the law which has been declared unconstitutional.[346] If the legislature does not immediately act and fill the gap, which seems unlikely as evident from the amount of time it took for the legislature to come up with a legislation for sexual harassment in the workplace post the SCI ruling in *Vishakha v. State of Rajasthan*,[347] a situation of lawlessness would arise. Striking down a law immediately could deprive deserving individuals of benefits without providing remedies to those aggrieved.

In the past, this fear of a legislative gap has led to the SCI holding laws valid, which, at face value, were violative of fundamental rights. For instance, in *Kartar Singh v. State of Punjab*,[348] the SCI did not hold provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 unconstitutional despite showing serious concerns about those provisions violating fundamental rights, because the law was one which concerned national security and holding it as void would have jeopardised the same.[349] A similar situation would arise if a law like SMA is held unconstitutional. There would be a legislative gap for a secular marital law, and interfaith couples would be left with little to no options. Thus, such a huge practical implication could justifiably deter courts from taking a hard line and declaring a legislation unconstitutional.

Finally, the principle of separation of powers is foundational to the Indian Constitution, ensuring that the judiciary, legislature, and executive each function independently. The judiciary's role is to interpret the law and protect fundamental rights, but it must also respect the legislature's authority to make and amend laws and, in general, deal with legislative matters.[350] When a law is found unconstitutional, declaring it void immediately could disrupt legislative functions and create chaos. This is especially true when the legislature is in the process of addressing the issue. An SFU allows the court to address the constitutional flaw without overstepping into the legislative domain, thus respecting the separation of powers.

By granting the legislature time to amend or replace the law, an SFU ensures that the judiciary's role in protecting rights is balanced with the legislature's responsibility to legislate. There might be a situation where the legislature chooses not to amend or replace the law within the stipulated time, leading to the emergence of a legislative vacuum. However, given that the legislature was provided with time precisely to avoid such immediate chaos, any non-conformity at that stage is a consequence of its own inaction, and the responsibility lies with the legislature, not the judiciary.

This remedy, therefore, prevents judicial overreach and upholds the constitutional balance between the branches of government.

These practical considerations, coupled with the assertion that the legislature should be the sole authority that can make laws and not the courts, are no doubt legitimate reasons to keep in mind while deciding if a law is void. However, as mentioned in the last section, such reasons cannot be used as justifications by the judiciary to defer from adjudicating on important

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[346] *See supra* Part IV.D, on "Remedies and Solutions".

[347] *See* Vishakha v. State of Rajasthan, (1997) 6 SCC 241 (Post this judgment, it took 16 years for the legislature to come up with the Prevention of Sexual Harassment at Workplace Act, 2013.)

[348] Kartar Singh v. State of Punjab, (1994) 3 SCC 569, ¶442.

[349] Chintan Chandrachud, *Judicial Review in the Shadow of Remedies* in BALANCED CONSTITUTIONALISM: COURTS AND LEGISLATURES IN INDIA AND THE UNITED KINGDOM, 168 (Oxford University Press, 2017).

[350] B. S. CHAUHAN, Judge, Supreme Court of India, *The Legislative Aspect of the Judiciary: Judicial Activism and Judicial Restraint* (National Judicial Academy, Lucknow, November 11, 2017).

matters. An SFU is the perfect solution to this dilemma. As Robert Jackson famously remarked while calling for courts to apply doctrinal logic with practical wisdom, "[T]he choice is not between order and liberty. It is between liberty with order and anarchy without either".[351]

While this section has discussed the necessity of a remedy like SFU in the Indian context, it is also important to engage with the counterarguments and constitutional concerns raised against its application. These contentions, particularly regarding the interpretation of Article 13(2) and the judiciary's duty to immediately declare unconstitutional laws void, need to be carefully addressed in order to understand whether SFU can be justified within the Indian legal framework.

### *B. CHALLENGES AND JUSTIFICATIONS FOR THE USE OF SFU IN INDIAN JURISPRUDENCE*

It has been argued that because of the way Article 13(2) of the Indian Constitution is phrased,[352] a suspended declaration like the one mentioned above would not work in case a legislation is challenged on grounds of a fundamental rights violation. Scholars opine that in such cases, there is a 'duty' upon the courts to strike down the legislation once it 'finds' out that the law is in contravention of Part III of the Constitution,[353] and there cannot be any delay in striking down a law, as the time frame to 'declare' the law void after such a finding is instantaneous.[354] Thus, a remedy like an SDI is constitutionally impossible.

However, this contention that the Indian courts have an unqualified duty to immediately strike down laws that violate Part III is based on a narrow interpretation of Article 13(2). While this view is grounded in the text of the Constitution, it overlooks the judiciary's discretionary powers under other constitutional provisions, particularly Article 142, which allows the courts to ensure complete justice.[355]

The authors propose that while the judiciary's hands are tied once it declares its 'findings' that the law is violative of any provision of Part III of the Constitution, and as such a declaration of invalidity cannot be suspended, the declaration or the pronouncement of this 'finding' itself can be suspended. Thus, this constitutional limitation can be bypassed. While this solution may initially seem like a stretch, the reasons outlined in the previous section, combined with the discretionary powers granted to the judiciary under the Constitution to determine the constitutionality of legislation, show that this approach is consistent with the constitutional framework without violating its provisions.

In India, laws operate with a presumption of constitutionality.[356] This presumption reflects the core principle of judicial restraint, ensuring that laws continue to be operational until

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[351] Terminiello v. Chicago, 337 U.S. 1 (1949), ¶122 (United States Supreme Court).
[352] The Constitution of India, 1950, Art. 13(2) (The Article reads "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.").
[353] Chandrachud, *supra* note 349, 175.
[354] Gautam Bhatia, *The Equal Marriage Case and a Suspended Declaration of Invalidity – A Response*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, July 9, 2023, available at https://indconlawphil.wordpress.com/2023/07/09/guest-post-the-equal-marriage-case-and-a-suspended-declaration-of-invalidity-a-response/ (Last visited on July 22, 2025).
[355] The Constitution of India, 1950, Art. 142.
[356] Ram Krishna Dalmia v. S.R. Tendolkar, 1958 SCC OnLine SC 6, ¶11.

the judiciary exercises its power of review.[357] Furthermore, as stated by the SCI, "the law passed by the legislature is good law till it is declared as unconstitutional by a competent Court or till it is repealed".[358] Thus, the presumption of constitutionality holds that a law is valid and operational until a court issues a formal declaration of its unconstitutionality. This principle recognises that laws do not automatically become void simply because they violate fundamental rights — they remain effective until challenged and, most importantly, declared void by a competent court. While Article 13(2) clearly mandates the invalidation of laws once it has been found to contravene fundamental rights, this 'finding' itself is put into effect once the court proclaims the same in its judgment. Thus, the court has the discretion to decide when it wants to fulfil this duty to hold the law void. Therefore, this 'finding' and the subsequent 'declaration' of the legislation as unconstitutional can be suspended until the court deems fit.

The Constitution gives the judiciary the power to consider whether an enactment is unconstitutional or not.[359] Thus, the judiciary also has the inherent power to suspend this 'finding of unconstitutionality'. Thus, until the court 'finds' a law to be in contravention of the fundamental rights, a law remains valid. This finding is solidified and put into effect once the court declares its finding in its judgment and final decision. This is also in line with Article 142 of the Constitution, which gives the SCI the power to do complete justice.[360] While there is no doubt that in the exercise of its power under this provision, the SCI cannot contravene a constitutional provision, an exercise of this power in the way it is being stipulated above does not actually go against anything written in the constitution, as it is silent on this issue. This is further supported by the court's reasoning in *Ashok Kumar Gupta* v. *State of Uttar Pradesh*, where commenting on the SCI's power to do complete justice under Article 142, it was held that:

> "Each case needs examination in the light of its backdrop and the indelible effect of the decision. In the ultimate analysis, it is for this Court to exercise its power to do complete justice or prevent injustice arising from the exigencies of the cause or matter before it. The question of lack of jurisdiction or nullity of the order of this Court does not arise. As held earlier, the power under Article 142 is a constituent power within the jurisdiction of this Court. So, the question of a law being void ab initio or nullity or voidable does not arise." [361]

*Maple Vishwanath Acharya* v. *State of Maharashtra* serves as an important precedent where, though it did not explain the procedure or power through which it was doing it, the SCI did not immediately strike down a law it found violative of fundamental grounds on account of manifest arbitrariness.[362] The reasoning given was the practical consideration that the legislation was time-bound and about to expire. Furthermore, a law to replace the one being challenged was already under consideration and would, in all probability, be brought by the legislature soon.[363] At the same time, the SCI made it clear that while they will allow the legislature to bring about a new law, if the same is not brought by the deadline, no extensions could be

[357] The State of Manipur & Ors. v. Surjakumar Okram & Ors., (2022) SCC OnLine SC 130, ¶16.
[358] *Id*.
[359] A.K. Gopalan v. State of Madras, (1950) SCC 228, ¶233.
[360] The Constitution of India, 1950, Art. 142.
[361] Ashok Kumar Gupta v. State of Uttar Pradesh, (1997) 5 SCC 201, ¶60.
[362] Malpe Vishwanath Acharya v. State of Maharashtra, (1998) 2 SCC 1, ¶¶31, 32.
[363] *Id*.

provided to the old law.[364] Thus, the SCI did not declare the law void despite finding it unconstitutional because it was a time-bound act, and a new law which would replace the one being challenged was already under consideration. This approach taken by the court proves that it takes practical aspects into consideration while declaring laws void immediately, even if they are found to violate Part III of the Constitution. The same approach was taken in cases like Indra Sawhney,[365] Sampath Kumar,[366] and *EPFO* v. *Sunil Kumar*.[367] While these cases did not concern a Part III challenge, they still serve as examples of the judiciary admitting that there is a need for a change in the *status quo* without immediately disturbing it itself or taking it upon itself to make the changes.

The concept of an SFU aligns with the Court's inherent power of suspension as seen in Article 142.[368] While there is no doubt that Article 142 ought to be used sparingly,[369] it nonetheless remains a vital constitutional tool for ensuring complete justice.[370] The authors submit that the Court's duty to uphold the Constitution should not be seen as incompatible with the discretion to temporarily suspend the effects of an unconstitutional law while allowing the legislature a reasonable period to rectify the violation. The SFU as a remedy serves this limited purpose — it does not reverse the finding of unconstitutionality but merely defers the legal consequences of that finding. It gives the government a short, clearly defined window to enact corrective measures, such as passing new legislation or amending the impugned law. This approach does not contravene the letter of Article 13(2), as it allows for a temporary stay on the law's invalidation, with the ultimate remedy contingent on legislative action.

Nevertheless, consistent with the cautious tone in Article 142 jurisprudence, such use must be tightly circumscribed. The exercise of this power should be reserved for exceptional cases, particularly that where immediate invalidation would lead to legal chaos, disrupt governance, or undermine essential state functions. The Canadian experience with SDIs shows how overuse of such a tool can dilute constitutional accountability, and this must serve as a cautionary tale.[371] A clearly delineated framework is therefore essential to ensure the remedy is neither overused nor misapplied.

The proposed framework, elaborated in the next sub-part, sets out the threshold conditions for granting an SFU. This structure ensures that SFUs remain a narrow, principled exception rather than an escape from constitutional scrutiny.

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[364] *Id*.
[365] Indra Sawhney, *supra* note 64.
[366] S.P. Sampath Kumar Etc v. Union of India & Ors., 1987 AIR 386.
[367] EPFO v. Sunil Kumar, (2022) 16 SCC 401.
[368] The Constitution of India, 1950, Art. 142.
[369] Supreme Court Bar Association v. Union of India, (1998) 4 SCC 409, ¶47.
[370] Hari Kartik Ramesh, *The Equal Marriage Case and a Suspended Declaration of Invalidity*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 4, 2023, available at https://indconlawphil.wordpress.com/2023/05/04/guest-post-the-equal-marriage-case-and-a-suspended-declaration-of-invalidity/ (Last visited on January 5, 2026).
[371] Grant R. Hoole, *Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law*, Vol. 49(1), ALBERTA L. REV., 107 (2011).

### *C. FRAMEWORK FOR THE JUDICIAL APPLICATION OF SUSPENDED FINDINGS OF UNCONSTITUTIONALITY ('SFU')*

The primary reason why there is a necessity for a remedy like an SFU is to allow the courts to adjudicate on matters that they believe are within the purview of the legislature and not the judiciary. The court as an institution does not have the same resources and the mandate to make laws as the legislature. However, this reasoning cannot be used as a justification for using such a remedy unless absolutely necessary. Suspending the finding of unconstitutionality of a legislation, which the court knows is violative of fundamental rights essential extends the duration for which the right is effectively being violated. Thus, it is necessary to set a framework for its usage by the courts.

The SCI has routinely used its power under Article 13(2) to either read down the legislation,[372] or use the doctrine of severability to only a legislation violative of fundamental rights to hold it void only to the extent of such violation, thereby keeping the rest of it intact.[373] Before considering an SFU, the court should at the first instance, check if any of these two remedies could be used to cure the defect in the law. Only after having decided the inapplicability of these remedies should, it proceed to the next test.

Grant R. Hoole, while coming up with a framework for the use of SDI for Canada, arrived at a solution based on the proportionality test employed bokayyaly the Canadian Courts for determining the validity of the legislation limiting people's exercise of their rights under the Canadian Charter.[374] This proportionality test is similar to the one employed by the SCI while determining if the limits imposed by a legislation on people's exercise of fundamental rights in India are valid or not. Hoole came up with the following test:

> "1. Would issuance of a suspended declaration of invalidity serve a pressing and substantial purpose?
>
> 2. Is there a rational connection between the purpose and a suspended declaration?
>
> 3. What impact on Charter rights will arise from the issuance of a suspended declaration, and is a suspended declaration the most minimally impairing measure that can be employed to achieve its objective?
>
> 4. Will the specific benefits achieved by the suspended declaration outweigh any adversity it inflicts on Charter rights?"[375]

If all the above questions could be answered in the affirmative, then a court would be entitled to suspend the declaration of invalidity.

Both Hoole's framework for suspended declarations of invalidity in Canadian constitutional law and the SCI's proportionality test for fundamental rights represent sophisticated judicial approaches to balancing constitutional rights against legitimate state interests. Despite their different applications, where one is a remedial principle and the other is a substantive

[372] B.R. Enterprises v. State of Uttar Pradesh & Ors., (1999) 9 SCC 700; Calcutta Gujarati Education Society & Anr. v. Calcutta Municipal Corporation. & Ors., (2003) 10 SCC 533.
[373] R.M.D. Chamarbaugwalla v. Union of India, 1957 SCC OnLine SC 11.
[374] Hoole, *supra* note 371.
[375] *Id*.

constitutional test, these frameworks demonstrate remarkable structural and methodological parallels. The proportionality test in India has been developed as a restriction on the legislature's power to curb people's fundamental rights.[376] Both tests employ a four-pronged analytical framework that progresses through increasingly demanding stages of scrutiny. Hoole's proportionality test for suspended declarations mirrors the structured approach later adopted by the SCI in *Modern Dental College* v. *State of Madhya Pradesh*[377] and refined in *K.S. Puttaswamy* v. *Union of India*.[378] The authors propose that such a test would also be an appropriate limit on the power of the courts to employ an SFU, ensuring that the suspension is necessary, suitable, and the least restrictive means to achieve the intended purpose.

Incorporating the proportionality test in India to make it a standard for the use of an SFU, the following would come up:

1. Would issuance of an SFU serve a pressing and substantial purpose? (similar to the legitimate goal stage in the proportionality analysis)
2. Is there a rational connection between the purpose and an SFU? (similar to the suitability or rational connection stage in the proportionality analysis)
3. What impact on fundamental rights will arise from the issuance of an SFU, and is an SFU the most minimally impairing measure that can be employed to achieve its objective? (similar to the necessity stage in the proportionality analysis)
4. Will the specific benefits achieved by an SFU outweigh any adversity it inflicts on fundamental rights? (similar to the balancing stage in the proportionality analysis)

At the first step, the Court would need to consider the consequences of an immediate declaration of invalidity and why such a declaration would do more harm than good.[379] This harm might include creating a legislative or social vacuum where the absence of clear legal provisions leaves individuals and institutions uncertain about their rights and obligations.[380] Furthermore, an immediate declaration could cause administrative chaos as existing legal frameworks for marriage would be disrupted without sufficient preparation for new mechanisms.[381]

Additionally, the Court must consider whether immediate invalidation would hinder the legislature's ability to craft a comprehensive and sustainable response. This could occur if the legislative process is unduly rushed, leading to poorly conceived policies that fail to address the complexities of the issue. For instance, in India, laws related to marriage, inheritance, adoption, and taxation are deeply interlinked.[382] Abruptly invalidating existing provisions without providing time for the legislature to account for these interdependencies could prejudice the public interest in achieving a sound and long-term remedial solution.[383]

[376] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 ('Puttaswamy').
[377] Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353, ¶60.
[378] Puttaswamy, *supra* note 376, ¶120 (per A. K. Sikri J.).
[379] Hoole, *supra* note 371, 145.
[380] Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 724 (Supreme Court of Canada).
[381] Supriyo, *supra* note 19, ¶208 (per Dr. D. Y. Chandrachud C.J.).
[382] *Id*., ¶150 (per Dr. D. Y. Chandrachud C.J.).
[383] Re Manitoba Language Rights, [1985] 1 S.C.R. 748 (Supreme Court of Canada).

The latter justification, concerning legislative discretion, is particularly nuanced. The court would need to demonstrate why the legislature's ordinary power to legislate in the face of an immediate declaration is inadequate. For example, the legislature may face political, social, or procedural barriers that prevent it from enacting an optimal solution within a short time frame.[384] By granting a suspended finding of unconstitutionality, the court could ensure that the legislature has sufficient time to deliberate and design policies that effectively balance competing interests, safeguard rights, and promote social harmony.

For the second step, the Court would need to evaluate whether the concerns raised in the first step, which justify the use of a suspended finding of unconstitutionality, can actually be mitigated through the suspension itself. This stage requires the Court to demonstrate a clear link between the temporary suspension of the finding and the resolution of the challenges outlined, such as legislative delays, administrative unpreparedness, or social unrest.[385] If the suspension merely delays the inevitable without addressing these concerns substantively, its justification would be undermined. The Court must justify why enabling the legislature through the specific instrument of a suspended finding is necessary and effective in achieving the desired goal.[386] Thus, only if there is a rational connection between the purposes identified in the first step and the issuance of an SFU would the courts be allowed to use this remedy.

In the third step, the Court would need to determine whether a suspended finding is indeed the least restrictive measure to address the issue at hand. This stage focuses on ensuring that the suspension does not unnecessarily or excessively impair the constitutional rights of affected individuals.[387] It demands a careful balancing of the need to temporarily delay the invalidation of an unconstitutional law against the harm caused by extending the violation of fundamental rights.[388] The Court must explicitly acknowledge the harm inflicted on constitutional rights by a suspended finding. It must define the nature and extent of this injury and consider whether less restrictive alternatives could achieve the pressing and substantial objectives identified earlier.[389] For instance, alternatives like issuing interim protective orders or narrowing the scope of the judgment might achieve the same objective without resorting to a suspension. If no viable alternatives exist, the Court must explore measures to mitigate the adverse effects of the suspension. These measures could include imposing a strict deadline on the period of suspension to ensure swift legislative or administrative action, imposing conditions on the suspension,[390] such as requiring interim protections for affected individuals retaining supervisory jurisdiction over the matter during the suspension period to monitor compliance and ensure timely progress or combining the SFU with remedies under Articles 32 or 226, which allow the judiciary to provide immediate relief to aggrieved parties while deferring broader structural changes to the legislature.

[384] These challenges may be in the form of complexity in the legislative process, for instance, laws may require multi-stage committee review, public consultation, or multiple readings, each introducing opportunities for delay or derailment. These can also be in the form of institutional constraints, for instance, India has a fixed number of Parliamentary sessions, which may restrict how quickly the legislature's bill can move through the process.
[385] Hoole, *supra* note 371, 145.
[386] *Id*.
[387] *Id*., 146.
[388] *Id*.
[389] *Id*.
[390] *Id*.

In the final step, the Court would need to evaluate whether the benefits achieved by employing an SFU outweigh the harm inflicted upon constitutional rights by the suspension.[391] This stage demands a nuanced balancing act where the court identifies and weighs the tangible benefits of granting the legislature time to rectify the legal flaw against the tangible injury caused by prolonging the violation of fundamental rights. To perform this balancing, courts can rely on qualitative and contextual factors rather than rigid formulas. For example, in *Reference re Manitoba Language Rights*, the Supreme Court of Canada balanced the constitutional requirement for bilingual legislation against the chaos that would ensue from immediate invalidation, determining that maintaining the rule of law was paramount in the interim.[392]

Thus, establishing this framework for the use of an SFU would ensure that the threshold for using this remedy is high, and it would also result in balancing judicial deference with the court's duty to uphold its duty to protect fundamental rights.

### *D. DEALING WITH CONSTITUTIONAL INFIRMITIES: RETROSPECTIVE AMENDMENTS AND SUSPENDED FINDINGS OF UNCONSTITIONALITY*

In India, the legislature has the authority to pass amendments with retrospective effect to address issues highlighted by the Court.[393] The same does not amount to a statutory overruling by the legislature.[394] However, such amendments cannot diminish existing rights; they may only clarify or expand the scope of existing provisions.[395] Furthermore, the courts must act based on retrospective amendments as if they were in force since the beginning.[396]

Typically, if a law is declared violative of Part III of the Constitution and thereby null and void (*void ab initio*), retrospective amendments cannot revive it, as it is treated as if it never existed.[397] However, if the court employs a remedy like an SFU, the law remains valid during the suspension period. This validity creates a window for the legislature to amend the law to address its constitutional infirmities. In such cases, the retrospective amendment would be considered valid and can cure the violation, ensuring the law aligns with the fundamental rights before the suspension period expires. This approach enables the legislature to address constitutional issues proactively without undermining judicial authority or the fundamental rights framework.

### *E. COMPATIBILITY OF SFU WITH DIXON'S THEORY*

An SFU is a remedy that embodies the dynamic balance between judicial deference and manifest arbitrariness, ensuring that courts can uphold constitutional commitments while respecting the democratic mandate of the legislature.[398] The framework of an SFU allows the Court to defer immediate invalidation of unconstitutional laws, providing the legislature an opportunity

[391] *Id*.
[392] Re Manitoba Language Rights, [1985] 1 S.C.R. 748 (Supreme Court of Canada).
[393] Mahal Chand Sethia v. State of West Bengal, 1969 UJ (SC) 616, ¶4.
[394] Cheviti Venkanna Yadav v. State of Telangana, (2017) SCC 1 283, ¶30.
[395] *Id*.
[396] *Id*.
[397] Deep Chand v. State of Uttar Pradesh, 1959 SCC OnLine SC 12, ¶¶3, 22.
[398] *See supra* Part IV, on "Invoking Responsive Judicial Review".

to rectify defects without undermining the sanctity of fundamental rights.[399] This remedy harmonises the competing ideals of democracy and constitutionalism, ensuring that judicial review is responsive to constitutional values and considerate of institutional boundaries.

This mechanism addresses the limitations of Dixon's rigid binary between judicial deference and manifest arbitrariness by recognising that both principles must evolve contextually, particularly in jurisdictions like India, where power separation is less rigid.[400] An SFU enables courts to adopt a flexible approach, wherein judicial restraint or intervention is informed by the urgency of constitutional violations, the societal impact of remedies, and the implications of legislative action.[401] It avoids the pitfalls of complete judicial abdication while preventing the judiciary from overstepping into the legislative domain, allowing courts to tailor remedies based on the specific circumstances of the case.

Additionally, an SFU complements Dixon's weak-strong remedies framework by positioning itself as a middle ground. While weak remedies like declarations of incompatibility may fail to achieve meaningful constitutional compliance, strong remedies like immediate invalidation risk democratic backlash or inertia.[402] An SFU strikes a balance by maintaining the validity of the law for a stipulated period, thereby respecting legislative discretion while providing a structured timeline for rectifying unconstitutional provisions. It enables courts to uphold constitutional commitments without creating unnecessary disruptions, framing judicial review as a dynamic process that prioritises justice, equity, and responsiveness to evolving constitutional needs.

## VI. EVALUATING JUDICIAL REVIEW THROUGH ITS APPLICATION ON THE CONFLICTS

In the preceding sections, a judicial review framework has been proposed, harmonising judicial deference and manifest arbitrariness to ensure responsive adjudication that aligns with constitutional commitments. This part revisits the four conflicts identified in Part III of the paper and demonstrates how the proposed framework could have been applied to achieve more constitutionally sound outcomes. The conflicts in question represent pivotal moments where the judiciary's approach significantly impacted constitutional values. The proposed framework considers the balance between judicial restraint and constitutional obligations, ensuring that courts neither abdicate their responsibility to uphold fundamental rights nor overstep their institutional boundaries.

### *A. FIRST CONFLICT*

As highlighted in Part III, in R.K. Garg, the judiciary deferred from adjudicating on a law which *prima facie* violated Article 14 of the Constitution, citing the legislature in question being an economic legislature. Justice Bhagwati argued that while there may be a possibility of abuse but, that by itself cannot be a reason for declaring a legislation unconstitutional.[403] However,

[399] *See* Part V.A, on "The Need for SFU: Addressing Practical Challenges, Legislative Gaps, and Separation of Powers" & V.B. "Challenges and Justifications for the Use of SFU in Indian Jurisprudence".
[400] Unnikrishnan & Audityaa, *supra* note 60.
[401] *See supra* Part V.B, on "Challenges and Justifications for the Use of SFU in Indian Jurisprudence".
[402] Dixon, *supra* note 20.
[403] RK Garg, *supra* note 72.

the foreign jurisprudence cited as authority for deferring from adjudicating on the matter was not substantiated as per the context of the case at hand. Essentially, the Court chose to take a very narrow view of the issue while ignoring its constitutional commitments. There was not a mere "possibility of abuse"; rather, the risk of abuse in R.K. Garg was concrete and foreseeable. The law effectively legitimised black money by giving immunity to its holders without sufficient safeguards. Thus, while the Court spoke of restraint, it overlooked the actual disproportionate impact and constitutional implications, straying from fulfilling its rational nexus.

Furthermore, the point of an arbitrariness review of a legislation is to determine whether a legislation has an unreasonable impact, which entails checking the possible impact of the legislation and foreseeing the magnitude of abuse that could be created by its provisions, so as to render it unreasonable.[404] The Court's push that an economic legislation cannot be held to be arbitrary does not hold since it has been applied in cases where economic legislations were in question.[405] There exists no rational reason for manifest arbitrariness to not be applicable in cases where economic legislations are being challenged based on what attracts constitutional values, and what does not.

The Electoral Bonds case differentiated itself from R.K. Garg, stating that if an economic legislation impacts civil and political rights, then it can also be held manifestly arbitrary.[406] Khanna J., in his concurring judgment, propounds that judicial deference cannot be applied in a straightforward manner.[407] It has also been held that judicial deference can be used in cases involving economic legislatures. However, this deference will be affected by constitutional commitments like Article 14.[408] This is in concurrence with the authors' proposition that judicial deference should not be applied in a candid manner, and when constitutional commitments are being affected, the court must look at the situation through a manifest arbitrariness lens. Thus, in R.K. Garg, taking this approach would lead to the bearer bonds scheme being held unconstitutional.

### *B. SECOND CONFLICT*

It has clearly been demonstrated in Part III that holding the Court to the standards of manifest arbitrariness as propounded in cases like Shayara Bano and Navtej Johar, the SMA should have been held unconstitutional because of manifest arbitrariness, as legislative inaction comes under the purview of the same as well. However, an immediate unconstitutionality would have led to undesirable results, and the Court itself provided guidelines for so many interconnected laws, which would have resulted in it going beyond its constitutional commitments. The remedy of an SFU would thus be optimum in such a case.

An SFU in the Same-Sex Marriage case would serve the pressing purpose of preventing immediate legal and administrative chaos while safeguarding the constitutional rights of same-sex couples. Striking down provisions of the SMA immediately could leave interfaith couples without a clear legal framework for marriage, creating a legislative vacuum and significant

[404] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722, ¶¶16, 17.
[405] Essar Steel, *supra* note 96, ¶127.
[406] Association for Democratic Reforms (Electoral Bond Scheme) v. Union of India, (2024) 5 SCC 1, ¶41 (Majority Judgment).
[407] *Id*., ¶15 (per Khanna J.).
[408] Essar Steel, *supra* note 96, ¶127.

uncertainty. By temporarily suspending the finding of unconstitutionality, the court allows the legislature the time to craft a comprehensive and rights-based framework, ensuring alignment with constitutional commitments to equality, dignity, and non-discrimination.

The SFU is rationally connected to its purpose as it balances competing interests: it preserves existing legal structures while giving the legislature a structured opportunity to address constitutional violations. By delaying invalidation, the SFU mitigates the harm of an immediate loss of legal rights for affected groups while ensuring the court fulfils its constitutional mandate. Ultimately, the benefits of legislative action informed by constitutional values outweigh the limited harm caused by the suspension, making the SFU a balanced and effective judicial remedy.

### *C. THIRD CONFLICT*

A responsive judicial review entails that issues before courts be resolved in a timely manner, especially those matters impacting the very democracy of the country and clearly going against 'public interest', to prevent the arbitrary actions of the legislation from causing irreparable actions.

This was especially the case in the Election Commissioner's case, where the delay was caused by the judiciary's lax approach in` taking up the matter immediately after it was filed, despite the fact that general elections were right around the corner. As a result, by the time the matter was finally addressed, any action taken would have led to extreme disorder in the country just two months before the election. The Court refused to take any action, considering elections were close.[409] However, this situation could have been foreseen when the case was filed and could have been taken up right then.[410] This clearly went against the constitutional commitments of the courts requiring them to take up and resolve urgent matters in a prompt manner.

In a situation where the petition against the Election Commissioner's Act was heard when it was filed on an urgent basis, there would have been sufficient time to apply an SFU with a reasonably strict time limit for the legislation to bring about a law for the appointment of the election commissioners before the elections so as to not affect the elections and at the same time curing the constitutional infirmity. All the elements requiring the application of an SFU would've been fulfilled since there would have been a legislative vacuum concerning the selection of a person for a very important position. This concern could be alleviated by giving time to the legislation to bring about a law and at the same time not adversely impacting the current election situation.

### *D. FOURTH CONFLICT*

The fourth conflict situation highlights the contrasting approaches in the now-upheld judgment of GS Patel J. in Kunal Kamra and the SCI's decision in the Foundation for Media Professionals case. Both cases involve the scope of restrictions on free speech under the guise of

[409] Jaya Thakur, *supra* note 19, ¶12.

[410] *See* SUPREME COURT OBSERVER, *Challenges to the Appointment of Election Commissioners Act, 2023*, available at https://www.scobserver.in/cases/challenges-to-the-appointment-of-election-commissioners-act-2023-eci/ (Last visited on October 6, 2025) (The case was filed in January itself, but the SCI refused to hear it or grant a stay).

national security, reflecting two divergent standards: the proximity test and the bad tendency test.[411]

The bad tendency test examines whether speech or actions have the potential to cause harm or disrupt public order, decency, or morality, even if such harm has not yet materialised.[412] This test permits restrictions based on speculative or remote risks, focusing on the potential rather than the actual likelihood of such speech hurting national security. The SCI's reasoning in Foundation for Media Professionals largely mirrors this approach, allowing restrictions on free speech to be justified by hypothetical threats under the guise of national security.[413] However, this test is frequently criticised for its overbroad and speculative nature, enabling restrictions based on unfounded concerns about future impacts without clear evidence of imminent harm.[414]

In contrast, the proximity test, as applied by GS Patel J. in Kunal Kamra, demands a closer and more direct connection between speech and the anticipated harm.[415] This standard ensures that restrictions on fundamental rights are grounded in tangible and immediate threats, preventing arbitrary curtailment of free speech based on remote or hypothetical risks. The proximity test upholds the constitutional mandate of reasonableness in Article 19(2) of the Constitution, ensuring that national security or public order is not misused to suppress legitimate expression.

The conflicting applications of these tests underscore the dangers of adopting the bad tendency test as a standard for regulating speech. Randomly applying such a broad standard risk undermining free speech by allowing overly restrictive measures that stifle dissent and legitimate criticism. As highlighted in Part III, this approach erodes the protections guaranteed under Article 19(1)(a) of the Constitution.

Despite the Court recognising this concern, it refrained from taking any action and constituted a committee comprising exclusively of members from the executive.[416] In all likelihood, such a committee would not take any steps which go against the interest of the executive. Thus, this solution is inappropriate.

A potential solution lies in forming a balanced committee with both judicial and executive members to evaluate cases involving national security concerns. While the executive would participate in this committee, its powers would not be absolute, ensuring accountability and preventing the blanket application of restrictive measures. Such an approach would protect the balance between safeguarding national security and preserving the fundamental right to free speech.

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[411] Lawrence Liang, *Free Speech and Expression* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, (Oxford University Press, 2016).
[412] *Id*.
[413] *Id*.
[414] *Id*.
[415] *Id*.
[416] Kunal Kamra, *supra* note 161, ¶95.

## VII. CONCLUSION

This paper offers a much-needed nuanced perspective on the ongoing dilemma of judicial deference versus manifest arbitrariness in India, an area that remains underexplored in existing discourse. The two doctrines are wielded as tools of constitutional authority by the SCI in situations where it wishes to exercise such authority, or relegate it altogether. However, it is evident how constitutional jurisprudence is marred by alternate instances of stringent action and relegation in India, which confuses how these two doctrines can be applied consistently.

The conflict shown by the authors is not merely an academic discussion but pertains to how decisions are taken by the apex court when adjudicating on constitutional matters. It does not merely confuse jurisprudence, but has wider implications in how the discourse of rights and constitutionalism evolves in India. If such consistency is not brought about, the Indian constitutional democracy will end up sliding into a state of exception, where there is no norm over when to check governmental powers via judicial review. On the other hand, the same will end up depending on courts' whims and fancies, in the absence of a strong legal regime that preserves the rule of law. The paper at its crux wishes to enforce this basic constitutional principle.

It does so by critically analysing cases which highlight the extent and reasons for such conflict. Even when such conflicts seem to be prima facie resolved on account of contextual differences among the cases, the authors showcase how such differences are not enough to create an inconsistent form of judicial review. This becomes a basis for proposing a harmonised solution based on existing literature while applying it to the Indian context. While conducting this exercise, the authors discovered that the inadequacy behind existing literature is a deep-rooted, larger issue of epistemological hierarchy, where the constitutional paradigm of the Global North has dictated and influenced contemporary conceptions of judicial review. What becomes more appalling is the unquestioned application of the same in countries like India, which tend to suffer from the blind faith put in by judges and academics over this model. Hence, the task ends up evolving for the authors to not simply resolve a conflict between two doctrines, but also to challenge the foundations on which judicial review is built. This challenge is undertaken keeping countries like India and possibly the states of other Global South democracies at hand, and what their constitution demands from their regime.

For this purpose, the authors propose that courts view alternate forms of remedy that might align better with this newly proposed model of judicial review. This would also balance both doctrines and maintain constitutional supremacy. An illustration of such a remedy aligned with the proposed judicial review becomes the SFU, offering courts a practical solution to the challenge of protecting fundamental rights while considering the real-world implications of declaring a law void. Lastly, the application of the newly proposed model, alongside newer remedies including the SFU, is looked at in the context of the previously identified conflicts, demonstrating the efficiency of the same in bringing about consistency. The last section brings the authors' endeavour to a full circle, where the inquiry they began appears resolved.

If implemented, the propositions in this paper have the potential to significantly impact some matters of utmost importance. With this paper, the authors also hope to highlight the dominant literature on judicial review as being insufficient for the Indian context. Based on this, the authors have proposed their remedial model to resolve the issue and serve the lacunae in existing literature. However, the authors only hope that this model serves the Indian dilemma,

while inspiring other Global South constitutional democracies facing similar issues to be inspired by the same.