

POLICE POWERS AND THE CONSTITUTION OF INDIA: THE INCONSPICUOUS ASCENT OF AN INCONGRUOUS AMERICAN IMPLANT

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Res extra commercium is a doctrine introduced by Chief Justice Das of the Supreme Court of India in the 1957 case, State of Bombay v. R.M.D. Chamarbaugwala, which has the effect of constricting the scope of fundamental rights by rendering as constitutional outcasts certain purportedly “immoral” or “noxious” activities. It does this by blocking these activities from falling within the purview of the protection of fundamental rights. At the core of this paper are three claims. First, it will be argued that though the court did not expressly spell it out, it was the doctrine of “police powers” (the specific conception of the doctrine advanced by Justice Harlan of the U.S. Supreme Court in Mugler v. Kansas), which lies behind Chief Justice Das’s invocation of res extra commercium. Second, it will be argued that Chief Justice Das did not openly invoke the police power doctrine in R.M.D. Chamarbaugwala because larger benches of the Supreme Court had earlier squarely rejected the import of the doctrine from American constitutional law (including one earlier abortive attempt by Chief Justice Das himself) because of the structural differences between the Constitutions of United States and India as a result of which, at the time the decision in R.M.D. Chamarbaugwala was handed down, the jurisprudential climate was positively hostile to the doctrine. Curiously, however, the police power doctrine, now masquerading, as the doctrine of res extra commercium has come to be well ensconced in the constitution law of India virtually unchallenged for over four decades now. The reasons for this anomaly will be explored. Finally, the paper argues why the police power doctrine sought to be imported by Chief Justice Das under the verbal dressing of res extra commercium is incongruous with the scheme of the Indian Constitution.

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If American decisions require to be used with caution, doctrines evolved by the U.S. Sup. Ct. in the context of the U.S. Constitution require to be scrutinised even more carefully before introducing them into our Constitution.

—H.M. Seervai¹

I. ISOLATING THE ISSUE

When a lawyer versed in the Constitutional Law of India—who is therefore no stranger to esoteric Latin incantations—hears the phrase *res extra commercium*,² she would undoubtedly know it is a perilously nebulous phrase. Her disquiet would deepen when she is told that the perilously nebulous phrase is a shell covering a doctrine imported from U.S. constitutional law which is treated with great circumspection by the lawyers and scholars there and has been squarely rejected by several early decisions of the Supreme Court of India: the doctrine of police powers.³ The disquiet would give way to perplexity upon learning that, despite the odds stacked up so heavily against the doctrine of *res extra commercium*, it is now so well ensconced in the constitutional law of India, that hardly anyone has questioned its soundness in the last seven decades.⁴

Res extra commercium is the verbal rubric for a doctrine that renders certain purportedly immoral or pernicious activities such as gambling, rural

¹ 1 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY § 2.140, at 238 (4th ed. 2002).

² See *infra* Part III; RUDOLF SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW § 59 (James Crawford Ledlie, trans., 3d ed. 1907) (“Certain things are prevented by a rule of law from being the objects of private rights. Such things are called ‘*res extra commercium*.’”).

³ See, e.g., Walter Wheeler Cook, *What is Police Power?*, 7 COLUM. L. REV. 322, 322 (1907) (stating that “[n]o phrase is more frequently used and at the same time less understood” than the phrase “police power”); 2 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW: GOVERNMENT 136 (Gin & Co. 1902) (1890) (“[T]he police power of the commonwealth is the ‘dark continent’ of our jurisprudence.”); Joseph L. Sax, *Takings and the Police Power* 74 YALE L.J. 36, 36 n.6 (1965) (“The term ‘police power’ has no exact definition.” (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954))). “Regulatory takings,” an area of American Constitutional law most closely involving use of the police power doctrine, and also the one which will concern us most here in the present Article, has been routinely described in the literature as a “bewildering mess.” E.g., James Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143 (1994) (“[T]he opening cliché in most of the scholarly commentary is that the law in this area is a bewildering mess.”).

⁴ Arvind P. Datar, *Privilege, Police Powers and Res Extra Commercium—Glaring Conceptual Errors*, 21 NAT’L L. SCH. INDIA REV. 133, 134–36 (2009);

money-lending, and selling intoxicating liquor as constitutional outcasts.⁵ Therefore, these activities are not protected by Article 19(1)(g) of the Constitution of India, which guarantees citizens the fundamental right to, “practice any profession, or to carry on any occupation, trade or business.”⁶ In arguments before the Supreme Court of India, the government has sought, though unsuccessfully, to extend the doctrine to the trade in tobacco, as well.⁷ Indeed, the government seems to invoke the doctrine in any matter that, by their estimate, involves an immoral activity.⁸

Introduced by Indian Supreme Court Chief Justice Das in 1957 in *Bombay v. R.M.D. Chamarbaugwala*,⁹ the doctrine of *res extra commercium*, in the context of the gambling business, has become firmly established in the constitutional law of India.¹⁰ The Supreme Court of India briefly threatened the ascent of the doctrine in *Narula v. Jammu & Kashmir*,¹¹ which involved the constitutionality of the trade in liquor. Not only did the Supreme Court in *Narula* turn down the state’s invitation to extend the doctrine to trade in liquor, but the Court also expressed reservations about the congruity of the doctrine with India’s constitutional scheme.¹² This, however, did little to halt the ascent of the doctrine: *Narula* has now, for long, been seen as somewhat of an

⁵ *Res extra commercium* was introduced in 1957 in the context of gambling in *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, 720–22 (India). In 1971, it was extended to sale of intoxicating liquor in *Nashirwar v. Madhya Pradesh*, (1975) 2 S.C.R. 861, 868–69, 871–22 (India) (“[A]ctivities, which are criminal, or dealing in articles or goods which are *res extra co commercium* could not have been intended to be permitted by Article 19(1)(f) and (g) relating to fundamental rights to trade or business.” (citing *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 720, 722 (India) (Chief Justice Das))). In 1977, the Indian Supreme Court extended the principle in *R.M.D. Chamarbaugwala* to exclude rural money as trade or commerce. *Himmatlal v. Maharashtra*, A.I.R. 1977 S.C. 1825, 1839 (India).

⁶ INDIA CONST. art. 19, § 1, cl. g.; SEERVAI, *supra* note 1, at 696; *see infra* Part II.

⁷ *See Godawat Pan Masala Prods. I.P. Ltd. v. Union of India*, (2004) 7 SCC 68 (India). *But see* T.K. Abraham v. Travancore Cochin, A.I.R. 1958 (Ker.) 129 (India). The Kerala High Court struck a discordant note by holding that dealing in tobacco is also *res extra commercium*. *Id.* However, this doesn’t seem to have been followed elsewhere thereafter.

⁸ *See, e.g., Maharashtra v. Indian Hotels & Rests. Assoc.*, (2013) 8 S.C.C. 519 (India). In this decision, the government of Maharashtra sought to invoke the doctrine of *res extra commercium*, though unsuccessfully, to justify a ban on dance bars, i.e. establishments serving alcohol along with dance performances by well-clothed female performers for their male patrons. *Id.*

⁹ *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 720.

¹⁰ *See, e.g., Punjab v. Devans Modern Breweries*, (2004) 11 S.C.C. 26 (India); *Khoday Distilleries Ltd. v. Karnataka*, A.I.R. 1996 S.C. 911 (India); *Shankar v. Deputy Excise & Taxation Comm’r*, (1975) 3 S.C.R. 254, 275–76 (India).

¹¹ *Narula v. Jammu & Kashmir*, A.I.R. 1967 S.C. 1368, 1373 (India).

¹² *Id.* at 1371. Chief Justice Subba Rao argued that the “approach leads to incoherence in thought and expression.” *Id.*

aberration.¹³ It is only recently that some voices, in the form of dissenting Supreme Court opinions, can be heard calling to bring this well entrenched doctrine into question.¹⁴ Notwithstanding these dissenting voices, it is no exaggeration to say that the doctrine has assumed somewhat of an axiomatic status in the constitutional law of India.¹⁵

At the core of this Article are three claims. First, this Article will argue that though Chief Justice Das in *R.M.D. Chamarbaugwala* did not expressly spell it out, the police power doctrine, imported from the constitutional law of the United States, was the invisible hand behind the doctrine of *res extra commercium*. More precisely, the conception of police powers advanced by U.S. Supreme Court Justice Harlan in *Mugler v. Kansas* lies behind Chief Justice Das's invocation of *res extra commercium*.¹⁶ It is this conception of police powers, this Article argues, that serves to constrict the scope of fundamental rights and places certain forms of governmental regulations outside the purview of constitutional protection and judicial review.¹⁷ Second, this Article argues that Chief Justice Das did not openly invoke the police power doctrine in *R.M.D. Chamarbaugwala* because larger benches of the Supreme Court had earlier expressly rejected the import of the American doctrine due to the structural differences between the two constitutions¹⁸ as a result of which the jurisprudential climate was positively hostile to the doctrine.¹⁹ In fact, Chief Justice Das had made earlier failed attempts to import the doctrine,²⁰ only to be faced with strong opposition from his brethren on the bench.²¹ Thirdly, it will be argued that the police power doctrine Chief Justice

¹³ See *Shankar*, (1975) 3 S.C.R. at 274–82. The Court approved the doctrine of *res extra commercium* as sought to be introduced in *R.M.D. Chamarbaugwala* and extended it to trade in liquor. *Id.* Justice Chandrachud noted that *Narula* struck a discordant note, flying in the face of precedent before it and hence cannot be regarded as authority on the incongruity of *res extra commercium* within the constitutional scheme of India. *Id.* at 277–78. The doctrine has grown in strength since. See, e.g., *Himmatlal v. Maharashtra*, A.I.R. 1977 S.C. 1825 (India); *Khoday Distilleries Ltd. v. Karnataka*, A.I.R. 1996 S.C. 911 (India); *Devans Modern Breweries*, (2004) 11 S.C.C. at 26.

¹⁴ See *Devans Modern Breweries*, (2004) 11 S.C.C. at 26 (Agrawal & Sinha, J.J., dissenting).

¹⁵ See generally Datar, *supra* note 4, at 134.

¹⁶ See *Mugler v. Kansas*, 123 U.S. 623, 658–59 (1887).

¹⁷ “Constriction” in this sense means a narrow reading of the fundamental right in question, obviating the inquiry of whether the regulation in question strikes a proper balance between individual liberties and social control.

¹⁸ See *Gopalan v. Madras*, A.I.R. 1950 S.C. 27, 38 (India), for a discussion of the Supreme Court of India's reservations about the police power doctrine in the 1950s.

¹⁹ See SEERVAI, *supra* note 1, at 239.

²⁰ See *Chowdhury v. Union of India*, A.I.R. 1951 S.C. 41, 68 (1950) (India).

²¹ See *W. Bengal v. Bose*, A.I.R. 1954 S.C. 92, 96–97 (1953) (India).

Das sought to import under the verbal dressing of *res extra commercium* is incongruous with the scheme of the Indian Constitution; it cannot perform the role assigned to it by Chief Justice Das—namely of blocking certain activities from falling within the purview of constitutional protection and rendering them constitutional outcasts.

Part II begins by setting out the nature of the freedoms guaranteed under Article 19(1)(g) and the limitations that can be imposed on them under Article 19(6). This Part sets out the conceptual difference between two kinds of regulations of fundamental rights in the Constitution of India: *ex ante* “constrictions” of fundamental rights and *ex post* “restrictions” on fundamental rights imposable under Article 19(6).²² It will then be argued that the concept of *res extra commercium* seeks to impose *ex ante* constrictions on fundamental rights as opposed to *ex post* restrictions, thus purporting to obviate the need to impose *ex post* restrictions under Article 19(6).

Part III will seek to disambiguate the phrase *res extra commercium*. This Article argue that the Indian Supreme Court uses the term in two entirely different senses, which we label as REC₁ and REC₂ to avoid confusion. REC₁ stands for a Roman law doctrine bearing the same label²³ that enumerates types of things or artifacts that cannot conceptually be “owned” and, hence, cannot be objects of commerce; they are *extra commercio*.²⁴ This Part argues that while REC₁ could form the basis for imposing *ex ante* constrictions, the concept neither purports to, nor is it geared to impose *ex ante* constrictions, on moral grounds, *i.e.* on the grounds that the activity in question is allegedly morally repugnant.²⁵ On the other hand, REC₂ blandly states the *effect* of *ex ante* constrictions on fundamental rights and hence does not even purport to be a ground or justification for such restriction. The moral prohibitory task is performed by some hidden, invisible hand mechanism. This Article argues that when Chief Justice Das introduced the phrase *res extra commercium* in *R.M.D. Chamarbaugwala*, he meant to use the REC₂ conception, in which the invisible hand mechanism already performs the moral prohibitory task.²⁶

²² Compare INDIA CONST. art. 19, § 1, cl. g (protecting the right to practice any profession, carry on any occupation, trade, or business regarding freedom of speech), with *id.* art. 19, § 6 (restricting Article 19(1)(g) rights to the interests of the “general public”).

²³ WILLIAM BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 310 (1918).

²⁴ SOHM, *supra* note 2, at § 59.

²⁵ See Datar, *supra* note 4, at 145.

²⁶ See *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, 720–22 (India).

Part IV argues that the invisible hand mechanism underlying Chief Justice Das' invocation of *res extra commercium* ("REC₂") was nothing but the police power doctrine. It hypothesizes that Chief Justice Das's particular notion of police powers is the one advanced by the U.S. Supreme Court in *Mugler v. Kansas*.²⁷ This notion of police powers served to place *ex ante* constrictions on the Takings Clause in the Fifth Amendment to the U.S. Constitution, by allowing certain interferences with property in the interest of health, safety, or morals.²⁸ *Res extra commercium* as originally conceived by Chief Justice Das in *R.M.D. Chamarbaugwala* was just a nebulous place holder—a misleading tag—for what really is an *ex ante* prohibition justified by the police power doctrine. This hypothesis will be substantiated in Part VI.

Part V sets out the role of the police power doctrine in American constitutional law. Judicial opinions and the literature clearly discern a wide and narrow scope of the concept. On the wide scope reading, the police power includes all governmental power left to the states by the U.S. Constitution, thus making it co-extensive with the residual sovereignty of the states.²⁹ On the narrow scope reading, the police power is not coterminous with the sovereignty of the states but is cabined to the government's power to ensure public health, safety, morals and general welfare.³⁰ For the present, it is the narrow scope reading that concerns this Article, since it is this reading that has been in play in the Fifth Amendment cases, where *Mugler v. Kansas* is the paradigm,³¹ and also the one Chief Justice Das sought to import into Indian jurisprudence.³² Here, this Article dwells a little longer on *Mugler* by emphasizing three aspects of Justice Harlan's opinion: (1) the valid subject of the exercise of police power; (2) the mode of exercise thereof of the power; and (3) the effect of a valid exercise of police powers.

²⁷ Compare *id.* (Das, C.J.), with *Mugler v. Kansas*, 123 U.S. 623, 658–59 (1887) (Harlan, J.).

²⁸ See *Mugler*, 123 U.S. at 658–59; U.S. CONST. amend. V.

²⁹ See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 458 (1827); *New York v. Miln*, 36 U.S. (11 Pet.) 102, 147 (1837); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842); See Christopher Supino, *The Police Power and "Public Use": Balancing the Public Interest Against Private Rights through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711 (2008).

³⁰ See *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public."); *Mugler*, 123 U.S. at 658–59; *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851).

³¹ See *Mugler*, 123 U.S. at 658–59.

³² E.g., *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, 720–22 (India).

Part VI argues that by introducing the notion of *ex ante* prohibition for gambling in *RMD Chamarbaugwala* under the label of *res extra commercium*, Chief Justice Das was actually importing the police powers doctrine into India: more specifically, the narrow conception of police powers. As a result, the police power doctrine was introduced through the back door, unnoticed, dressed with the label: “*res extra commercium*.” This Article will also explain why Chief Justice Das had to import the police power doctrine under the verbal dressing of *res extra commercium*.

Part VII argues that the detractors and supporters of the concept of *res extra commercium* have, for the most part, been talking past each other as they have had two entirely different conceptions of the doctrine in mind.³³ The few detractors of *res extra commercium* have believed all along that it is the REC₁ conception that Chief Justice Das introduced and argued, over the decades, that the Roman law conception of *res extra commercium* (REC₁) simply cannot create restrictions on any activity in the name of morality.³⁴ On the other hand, the supporters of the doctrine, including later Indian Supreme Court judgments, have not made an effective attempt to illustrate how the police power doctrine, which is the invisible hand mechanism behind their conception of *res extra commercium* (REC₂), can be accommodated within the scheme of the Indian Constitution. There is a price paid for this misunderstanding. The police power doctrine and the *ex ante* constrictions premised thereupon have become ensconced as a part of the Indian Constitution without the least judicial reflection about the congruity of the doctrine with the Indian Constitution.³⁵ Despite a line of Indian Supreme Court decisions from the 1950s specifically rejecting the import of the police power doctrine from U.S. constitutional law,³⁶ and despite no justificatory argument having been advanced in its favor, the police power doctrine has made a silent entry into Indian constitutional law,³⁷ disguised under the verbal dressing of *res extra commercium* and entrenched itself almost as if by adverse possession.³⁸

³³ Compare *Narula v. Jammu & Kashmir*, A.I.R. 1967 S.C. 1368 (India), with *Punjab v. Devans Modern Breweries*, (2004) 11 S.C.C. 26 (Sinha, J., dissenting) (India).

³⁴ See *Narula*, A.I.R. 1967 S.C. at 1371; *Devans Modern Breweries*, (2004) 11 S.C.C. at 26.

³⁵ See *Shankar*, A.I.R. 1975 S.C. at 1121; *Khoday Distilleries*, A.I.R. 1996 S.C. 911.

³⁶ See *Chowdhury v. Union of India*, A.I.R. 1951 S.C. 41, 68 (1950) (India); *W. Bengal v. Bose*, A.I.R. 1954 S.C. 92, 96–97 (India).

³⁷ See *Datar*, *supra* note 4, at 147.

³⁸ See *id.*

Part VIII examines the conceptual ambiguity in Indian Supreme Court judgments dealing with *res extra commercium*. This is equally the problem with both species of judgment, namely, those prohibiting certain spheres of activity by applying the doctrine, as well as those refusing to extend the doctrine to certain activities. Underlying this ambiguity is an imprecise characterization of the nature of the fundamental rights found in Article 19(1)(g) and its interplay with reasonable restrictions under Article 19(6).³⁹ As we will see here, even the latest decisions of the Supreme Court reflect this conceptual confusion about the doctrine of *res extra commercium*.

Part IX argues that *Mugler*-type *ex ante* constrictions on fundamental rights under Article 19 are not permissible for three reasons: (1) Constitutional liberties are not capable of *ex ante* constrictions, and since what Article 19 guarantees are liberties, they cannot be subject to a *Mugler*-type of constriction; (2) if *ex ante* constrictions are permissible on the grounds of health, safety, and morals, the whole idea of reasonable restrictions would be redundant; and (3) concerns leading to constriction of fundamental rights in *Mugler* are absent in India.

This Article concludes that the primary gripe with the doctrine of *res extra commercium* is that it completely blocks the courts from undertaking any such inquiry or balancing. If the argument in this Article is accepted, it would be for the courts to actually undertake such balancing and determine where the balance of reasonableness lies. Where the balance of reasonableness lies for many of the activities currently *ex ante* constricted under the doctrine of *res extra commercium* is something that would be beyond the scope of this Article. Each restriction would have to be examined individually, and no abstract standards can be laid down in advance. It is highly unlikely that the pervasive restrictions on many activities currently countenanced would, in their existing form, pass muster under a reasonableness test under Article 19(1)(6). Perhaps the greatest advantage of jettisoning *res extra commercium* doctrine would be to remove a convenient fig leaf under which the state hides its numerous invasions on fundamental freedoms under Article 19.

³⁹ Compare INDIA CONST. art. 19, § 1, cl. g, with *id.* art. 19, § 6.

II. CONSTITUTIONAL OUTCASTS AND *EX ANTE* RESTRICTIONS ON FUNDAMENTAL FREEDOMS

Part III of the Constitution of India enumerates fundamental rights and freedoms available to citizens.⁴⁰ Articles 19(1)(a)–(g) guarantee certain fundamental freedoms to citizens.⁴¹ Articles 19(2)–(6) enumerate the grounds that the state may use to reasonably restrict the freedoms contained in Articles 19(1)(a)–(g).⁴² Article 19(1)(g) provides that citizens shall have the right to carry on any “profession,” “occupation,” “trade,” or “business.”⁴³ The limits to this right are found in Article 19(6), which empowers the state to enact “law” to impose “reasonable restrictions” on any such trade activity or business “in the interests of the general public.”⁴⁴ The phrase “in the interests of the general public” has been subject to a wide interpretation encompassing within its ambit considerations of public health, safety, and morals.⁴⁵ The standard test of

⁴⁰ INDIA CONST. pt. III. Part III of the Constitution consists of Articles 12–35. *Id.* Article 13 specifies that any law contravening any of the fundamental rights enumerated in Part III will be invalid. *Id.* art. 13. Article 32(1) allows the party whose fundamental rights are violated to approach the Supreme Court directly for redressal. INDIA CONST. art. 32, § 1. In *Gopalan*, Chief Justice Kania opined that Article 13 was inserted out of abundant caution. *Gopalan v. Madras*, A.I.R. 1950 S.C. 27, 34 (India). However, in *Sajjan Singh v. Rajasthan*, Justice Hidayatullah questioned Chief Justice Kania on this point by arguing that Article 13 is hardly redundant, as the Chief Justice makes it out to be. *Singh v. Rajasthan*, A.I.R. 1965 S.C. 845 (India). Whatever view one may take on the broader debate about the redundancy or otherwise of the provision, there is no denying the fact that even in the absence of Article 13, the judiciary would have had the power of constitutional review. INDIA CONST. art. 13.

⁴¹ INDIA CONST. art. 19, § 1, cls. a–g. The Constitution of India clusters the provisions of Part III under distinct headings. Articles 19–22 are clustered under the heading “Right to Freedom.” *Id.* arts. 19–22. The fundamental freedoms in Article 19 include: (1) freedom of speech and expression; (2) freedom to assemble peaceably without arms; (3) freedom to form associations; (4) freedom to move freely throughout the territory of India; (5) freedom to reside and settle in any part of the territory of India. *Id.* art. 19 § 1, cl. f; and the freedom to carry on any occupation, trade or business. *Id.* art. 19, § 1, cls. a–f, g. The reasonable limitations which can be imposed on these fundamental freedoms are enumerated in Articles 19(2) to (6). *Id.* art. 19, §§ 2–6. The freedom to hold and dispose property was a fundamental freedom under Article 19(1)(f), but this freedom was deprived of its status as a fundamental right by the Forty-Fourth amendment in the year 1978 and was moved to Article 300A as an ordinary constitutional right. The Constitution (Forty-Fourth Amendment) Act, 1978 (India).

⁴² INDIA CONST. art. 19, §§ 2–6. The term “reasonableness” is incapable of exact definition. *See, e.g., Madras v. V.G. Row*, A.I.R. 1952 S.C. 196, 200 (India). It was held that the each restriction ought to be tested individually as no general or abstract standard applicable to all cases could be devised. *Id.*

⁴³ INDIA CONST. art. 19, § 1, cl. g. For the sake of economy and convenience, profession, occupation, trade and business will be referred to as “activity.”

⁴⁴ INDIA CONST. art. 19, § 6 (“Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause”)

⁴⁵ *See Papanasam Labour Union v. Madura Coats*, A.I.R. 1995 S.C. 2200 (India). The Supreme Court held the court’s approach to assessing the reasonableness of restrictions should be dynamic—alive to the felt

challenging an alleged invasion of the freedom under Article 19(1)(g) involves assessing whether the law passes the reasonable restriction test under Article 19(6).⁴⁶

The doctrine of *res extra commercium* acts as a constriction on Article 19(1)(g)—and it operates in a manner clearly distinct from reasonable restrictions under Article 19(6).⁴⁷ The effect of the doctrine of *res extra commercium* is that some, purportedly, “immoral” activities do not come within the purview of the fundamental right to carry on trade and business under Article 19(1)(g).⁴⁸ Such activities are blocked *ex ante* from falling under Article 19(1)(g), thus obviating the need for the state to enact specific “law” under Article 19(6) to impose reasonable restrictions. In other words, Article 19(1)(g) is constricted so as to make such activities fall completely outside its purview.⁴⁹ Despite how onerous or unjust the regulation on such trade or activity may thought to be, they cannot be judicially reviewed for whether they infringe fundamental rights because the trade in such activity falls outside the purview of the Constitution of India.⁵⁰ In fact, the courts have shied away from dignifying these activities with the terms “trade” or “business,” instead to label

need of the society. *Id.* After much uncertainty on the point in the first decade of the Constitution, i.e the 1950s, the Supreme Court held in 1960 that “restriction” under clauses 19(2) to 19(6) could also include “prohibition.” *Kumar v. Union of India*, A.I.R. 1960 S.C. 430, 436 (India); *see* *Mun. Corp. of Ahmedabad v. Usmanbhai*, A.I.R. 1986 S.C. 1205, 1212 (India) (“The expression ‘in the interest of general public’ is of wide import comprehending public order, public health, public security, morals, economic welfare of the community . . .”).

⁴⁶ *See Chintamanrao*, A.I.R. 1951 S.C.118 at 119. Setting out the test for reasonableness in Justice Mahajan opined:

[T]he limitation . . . should not be arbitrary or of an excessive nature beyond what is required in the interests of the public. The word “reasonable” implies intelligent care and deliberation that is the choice of course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art[icle] 19(1)(g) and the [sic] social control permitted by cl[ause] 6 of Art[icle] 19(6), it must be held to be wanting in that quality.

Id.

⁴⁷ *See R.M.D. Chamarbaugwala v. Union of India*, A.I.R. 1957 S.C. 628, 631 (India).

⁴⁸ *See id.* This was a petition related to *R.M.D. Chamarbaugwala* where the Supreme Court held:

[A]s regards gambling competitions, the petitioners before us cannot seek the protection of Art. 19(1)(g), and that the question whether the restrictions enacted in ss. 4 and 5 and Rr. 11 and 12 are reasonable and in the interest of the public within Art. 19(6) does not therefore arise for consideration.

Id.

⁴⁹ *See SEERVAI*, *supra* note 1, at 694–95.

⁵⁰ *Sheoshankar v. Madhya Pradesh*, (1951) 52 Crim. L.J. (H.C.) 1140 (India).

them as “traffic”.⁵¹ When considering the constitutional question on the freedom to carry on any activity, such activity is acknowledged to fall under Article 19(1)(g), and the law that circumscribes the freedom is tested on the anvil of reasonableness under Article 19(6).⁵² Conceptually, the limitations under Article 19(6) can be understood as *ex post* restrictions of the freedoms under Article 19(1)(g).⁵³ On the other hand, when an activity is blocked from falling under Article 19(1)(g), there is an *ex ante* restriction of Article 19(1)(g) as opposed to an *ex post* restriction.⁵⁴ In imposing *ex ante* restrictions, the Supreme Court blocked a class of activity from falling under Art 19(1)(g) thus obviating the need to impose reasonable restrictions on them by “law” enacted under Article 19(6) or the need to assess whether the restriction is indeed a reasonable one.⁵⁵ As a result, activities thought to be *res extra commercium* are invariably liable to far greater control by the state, than those falling under Article 19(1)(g), and are not entitled to any of the protections guaranteed to activities under Article 19(1)(g) either.⁵⁶ Ultimately, the effect of the doctrine of *res extra commercium* is that it renders certain activities constitutional outcasts.⁵⁷

Two important consequences are predicated on the declaration of these activities as *res extra commercium*. First, the activities in question cannot claim the protection afforded to interstate trade and commerce.⁵⁸ The courts have held that the right to interstate trade and commerce can only be claimed by activities that fall within the ambit of Article 19(1)(g).⁵⁹ Second, the courts have developed the exclusive privilege theory,⁶⁰ stating that where an activity

⁵¹ Shankar v. Dy. Excise & Taxation Comm’r, A.I.R. 1975 S.C. 1121 (India).

⁵² See Madras v. Row, A.I.R. 1952 S.C. 196, 200 (India).

⁵³ See Kumar v. Union of India, A.I.R. 1960 S.C. 430, 436 (India). A complete prohibition on an activity would also fall within the ambit of Article 19(6) and hence count as an *ex post* restriction. *Id.*

⁵⁴ See R.M.D. Chamarbaugwala v. Union of India, A.I.R. 1957 S.C. 628, 631 (India).

⁵⁵ See *id.*

⁵⁶ See generally M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1036 (2005).

⁵⁷ See Ugar Sugar Works Ltd. v. Delhi Admin., A.I.R. 2001 S.C. 1447, 1449–52 (India). The *Ugar Sugar Works Ltd. v. Delhi Admin.* case is an example of where the Supreme Court of India interpreted Article 14, which guarantees “equality before the law or the equal protection of laws,” to proscribe unfair discrimination and arbitrariness regardless of whether the activity in constitution was *res extra commercium*. INDIA CONST. art. 14; *Ugar Sugar Works Ltd.*, A.I.R. 2001 S.C. at 1447 (India). An activity which is *res extra commercium* and hence a constitutional outcast is nevertheless entitled to this sole constitutional protection.

⁵⁸ See INDIA CONST. arts 301–07 (containing the right to interstate trade and commerce).

⁵⁹ See, e.g., Punjab v. Devans Modern Breweries, (2004) 11 S.C.C. 26 (India); see also Datar, *supra* note 4, at 144. This has led to some absurdities, as Datar points out. Datar, *supra* note 4, at 144.

⁶⁰ See *id.* 134–36.

is immoral or pernicious, the state has the exclusive privilege to deal in the activity in question⁶¹ and the revenue raised by the state from any such activity is a form of rent rather than a tax or fee.⁶²

III. TWO CONCEPTS OF *RES EXTRA COMMERCIIUM*

The scheme of rendering some activities constitutional outcasts with *ex ante* restrictions operates under the tantalizingly confusing label: *res extra commercium*.⁶³ In 1957, Chief Justice Das first introduced the *res extra commercium* label in *R.M.D. Chamarbaugwala* with the notion of *ex ante* prohibition on gambling.⁶⁴ The label has stuck, and adherents and detractors of *ex ante* restrictions on a class of activities have centered their debates around the concept of *res extra commercium*.⁶⁵ Chief Justice Das relied on the notion of *res extra commercium* to justify imposing *ex ante* prohibitions on certain purportedly immoral activities.⁶⁶ The detractors have sought to contend that the notion of *res extra commercium* cannot justify the imposition of *ex ante* prohibitions on any activity even if it is admittedly an immoral one.⁶⁷ It may seem that the Chief Justice Das and the detractors of the doctrine of *res extra commercium* as a justification of *ex ante* prohibition have a genuine debate.⁶⁸ However, it turns out that the adherents and detractors are actually talking past each other; the reason for this being that the adherents and detractors have had two entirely different concepts of *res extra commercium* in mind. In what follows, the two concepts of *res extra commercium* will be outlined.

⁶¹ See *C.S.S. Motor Serv. v. Madras*, A.I.R. 1953 (Madras H.C.) 279 (1952) (India), cited with approval in *Ahmad v. Uttar Pradesh*, 1954 A.I.R. 728, 740 (India).

⁶² See *Satpal & Co. v. Lt. Governor of Delhi*, A.I.R. 1979 S.C. 1550, 1557 (India).

⁶³ The first known use of *res extra commercium* by the Supreme Court of India was in *Mullick v. Debabrata Mullick*, (1951) 38 A.I.R. S.C. 293, 301 (India). However, the phrase did not denote anything close to what Chief Justice Das's *R.M.D. Chamarbaugwala* opinion, which purported to denote by it. *Id.*; *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 628 (India).

⁶⁴ See *R.M.D. Chamarbaugwala*, 1957 S.C.R. at 720 (India).

⁶⁵ *Id.*; *Narula v. Jammu & Kashmir*, A.I.R. 1967 S.C. 1368 (India); *Punjab v. Devans Modern Breweries*, (2004) 11 S.C.C. 26 (2003) (India).

⁶⁶ *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 699 (India).

⁶⁷ Chief Justice Subba Rao was the earliest critic of the doctrine. *Narula*, A.I.R. 1967 S.C. at 1368 (India). Nearly four decades later, Justice Sinha was the most vociferous critic of the doctrine. *Devans Modern Breweries*, (2004) 11 S.C.C. at 26 (India).

⁶⁸ As shall be seen in Parts VII and VIII, despite later generations of Supreme Court Justices realizing the hidden police powers behind the doctrine of *res extra commercium*, they continue to criticize it.

Translated literally from Latin, the phrase *res extra commercium* means “not the object of commerce.”⁶⁹ The phrase *res extra commercium* has been employed in Indian Supreme Court judgments to denote two very distinct notions. One of them purportedly provides a *ground* for imposing *ex ante* restrictions, REC₁; and the other merely states the *effect* of *ex ante* restrictions, REC₂. While REC₁ does purport to be a *ground* for imposing *ex ante* restrictions, the concept is not geared to do the moral prohibitory task it purports to. On the other hand, REC₂ blandly states the effect of *ex ante* restrictions on some activity and does not purport to be a ground or justification for imposing *ex ante* restrictions. From a consideration of the judicial opinions on the point, it appears that the detractors of *res extra commercium* have taken the phrase to refer to REC₁, while the supporters (beginning with Chief Justice Das) understand the phrase to refer to REC₂.

REC₁ stands for the Roman law doctrine that enumerates the types of thing or artifact which cannot conceptually be “owned” and hence cannot be “alienated.”⁷⁰ Accordingly, they are not objects of commerce; they are *extra commercio*.⁷¹ In Justinian’s *Institutes of Roman Law*, only three classes of entity are conceptually *res extra commercium*: (1) *res divini*; (2) *res publicae*; and (3) *res omnium communes*.⁷² *Res divini* comprises *res sacrae* (churches) and *res religiosae* (cemeteries).⁷³ Over the centuries, these have fallen out of the *extra commercio* category as they can now be owned.⁷⁴ *Res publicae* denotes that what is used by the state for discharging sovereign functions cannot be objects or resources that are owned.⁷⁵ *Res omnium communes* comprises the things which belong to the community as a whole,⁷⁶ such as air, river, the sea, etc., and thus cannot be owned individually.⁷⁷ To this we could

⁶⁹ Daniel R. Coquillette, *Mosses From an Old Manse: Another Look at Some Historical Property Cases About the Environment*, 64 CORNELL L. REV. 761, 803 (1979); SOHM, *supra* note 2, § 59, at 302.

⁷⁰ Burdick, *supra* note 23, at 310.

⁷¹ The terms *nostro patrimonio* and *extra nostrum patrimonium* were used interchangeably with *in commercio* and *extra commercio*, elsewhere also referred to as *alicujus in bonis* and *nullius in bonis*. *Introduction to THE INSTITUTES OF JUSTINIAN* 36 (Thomas Sandars trans. 1883).

⁷² *Id.*

⁷³ *Id.*; Datar, *supra* note 4, at 145.

⁷⁴ *Id.* at 145.

⁷⁵ The Parliament building, for instance, would fall under the class of *res publicae*.

⁷⁶ ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 197 (1922).

⁷⁷ See generally PHILIP E. STEINBER, *The Social Construction of the Ocean*, in 78 *CAMBRIDGE STUDIES IN INTERNATIONAL RELATIONS* 91 (Smith et al. eds., 2001). Wild animals which are referred to with the label “*ferrae naturae*” would fall under this class. *Id.*

add the category of *res nullius*: things that belonged to no one.⁷⁸ These were things that were believed could not be “owned” and are *extra commercio* that they can not be the subject of commerce.⁷⁹ It bears emphasis that each of the above classes of things are conceptually barred from being the subject of ownership and alienation in Roman law, not because of some overarching moral justification proscribing their ownership or alienation,⁸⁰ but because of the *conceptual* embargo in the ownership of these type of things.⁸¹ Even the most morally repugnant objects could, on Justinian’s classification, be conceptually capable of being owned and alienated and, hence, would be *in commercio*: objects of trade and commerce.⁸² REC₁, then, cannot play any real part in either explaining or justifying the scheme of *ex ante* prohibition on grounds of moral repugnancy. The original concept of REC₁ was never designed to be a moral prohibitory device.⁸³ The only doctrine familiar to constitutional jurisprudence that plays the role of an *ex ante* moral prohibitory device is the police power doctrine.⁸⁴ When Chief Justice Das introduced the idea of *res extra commercium*, he did not mean to use it in the sense of REC₁ at all. Unfortunately, several generations of Supreme Court judges who succeeded him—particularly those who opposed the notion of *ex ante* prohibitions—mistook him as having introduced the REC₁ notion resulting in great conceptual confusion.

Separately, the other concept of *res extra commercium*, REC₂, does not purport to be a ground for imposing any *ex ante* moral prohibition but rather states the effects of *ex ante* restrictions. If no further justification for *ex ante* prohibition is forthcoming, the *ex ante* prohibitions, referred to by REC₂, hang in the air and remain unjustified. A judge relying exclusively on REC₂ does not justify the *ex ante* prohibition but gives its consequence—a *fait accompli*. In other words, some other unnamed principle must do all the work for justifying

⁷⁸ See Gerald Torres, *Who Owns the Sky?*, 19 PACE ENVTL L. REV. (SPECIAL ISSUE) 515, 529 n.4⁷ (2002) (citing Daniel R. Coquillette, *Mosses From an Old Manse: Another Look at Some Historical Property Cases About the Environment*, 64 CORNELL L. REV. 761, 803 n.196 (1979)).

⁷⁹ Coquillette, *supra* note 69, at 803.

⁸⁰ See *Datar*, *supra* note 4, 145 (“It is clear from these categories that morality had no role to play in the classification of property as *res extra commercium*.”).

⁸¹ The concept of *res extra commercium* has lately come to assume great significance among international lawyers. See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 376–77 (1986); KEMAL BASLAR, *The Concept of Common Heritage of Mankind in International Law*, in 30 DEVELOPMENTS IN INTERNATIONAL LAW 40–41 (1998).

⁸² *Introduction*, *supra* note 71, at 36.

⁸³ See *Mullick v. Mullick*, A.I.R. 1951 S.C. 293, 301 (India).

⁸⁴ See *infra* Parts V, VI.

the imposition of *ex ante* prohibitions, of which the effect of that activity becomes *extra commercio*. Thus REC₂ simply describes the effect of an *ex ante* prohibition, justifiable on some other independent ground. A judge relying on REC₂, and nothing more, runs the risk of making a circular argument because the question of what makes the case REC₂, the argument that the activity in question is *ex ante* prohibited, remains alive. In the next Part, it will be argued that while introducing the idea of *res extra commercium* in *R.M.D. Chamarbaugwala*, Chief Justice Das was referring to the REC₂ conception, not REC₁, and the invisible hand mechanism that effected the moral prohibition was the unnamed police power doctrine: an import from American constitutional jurisprudence.

IV. THE INVISIBLE HAND OF POLICE POWERS

The invisible hand mechanism in Chief Justice Das' judgment was nothing but the police power doctrine, or at least a certain conception of that doctrine imported from American constitutional thought.⁸⁵ Further, this particular conception of police powers has traditionally been used to introduce *ex ante* constrictions on certain fundamental rights regarding certain matters in interest of health, safety, or morals.⁸⁶ *Res extra commercium* (REC₂) as originally conceived by Chief Justice Das in *R.M.D. Chamarbaugwala*,⁸⁷ was just a nebulous place holder—a misleading tag—for what really is an *ex ante* regulation justified by the police power doctrine.

Still Chief Justice Das's opinion does not even on one occasion refer in the original to the police power doctrine.⁸⁸ The only place where the police power

⁸⁵ It will be argued in Part V, that the particular conception of police powers that purports to have this effect is the one propounded in the landmark case of *Mugler v. Kansas*. See *infra* Part V.

⁸⁶ As we shall see in Part V, police powers have traditionally meant different things to different people. One conception of the doctrine is the protection of health, safety, and morals. *Mugler v. Kansas*, 123 U.S. 623 (1887) (“Lawful state legislation, in the exercise of the police powers of the State, to prohibit the manufacture and sale within the State of spirituous, malt, vinous, fermented, or other intoxicating liquors, to be used as a beverage, may be enforced against persons who, at the time, happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments.”); see also U.S. CONST. amend. V.

⁸⁷ *R.M.D. Chamarbaugwala*, 1957 A.I.R. S.C. at 699 (India).

⁸⁸ While *R.M.D. Chamarbaugwala* did not specifically invoke the police power doctrine, one Supreme Court decision before it purported to do so. See *Bharucha v. Excise Comm'r*, A.I.R. 1954 S.C. 220, 223 (India) (“There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But as

doctrine is mentioned is derivative, or second hand, when he quotes from the High Court of Australia case *Mansell v. Beck*, where the validity of a New South Wales statute proscribing the sale of lotteries from other states was in question.⁸⁹ In *Mansell v. Beck*, Justice Williams held that the freedom of interstate trade and commerce under Section 92 of the Australian Constitution did not extend to activities suppressible by police power as a public nuisance or as pernicious.⁹⁰ He effectively blocked, *ex ante*, some trades from falling within Section 92 of the Australian Constitution's guarantees of inter-state trade and commerce.⁹¹ An analysis of Chief Justice Das's reasoning leaves no

it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying." (quoting *Crowley v. Christensen*, 137 U.S. 86, 90–91 (1890))). However, the effect of *Bharucha*, unlike the doctrine of *res extra commercium*, does not constrict the scope of Article 19. INDIA CONST. art. 19; *Bharucha*, A.I.R. 1954 S.C. at 220 (India). Indeed, it could be argued that the Court could have arrived at its conclusion it invoking the police power doctrine. *Bharucha*, A.I.R. 1954 S.C. at 223 (India). The Court upheld restrictions on free trade under Article 19(6), which it could have done without having to invoke the police power doctrine at all. See *Narula v. Jammu & Kashmir*, A.I.R. 1967 S.C. 1368, 1371–72 (India) (commenting on *Bharucha*, A.I.R. 1954 S.C. at 220 (India)). In *Narula*, Chief Justice Subba Rao stated that: "Indeed, a perusal of the entire judgment shows that the Court conceded the fundamental right but held that the said regulation operated as a reasonable restriction on the said rights." *Narula*, A.I.R. 1967 S.C. at 1372 (citing *Assam v. Kidwai*, A.I.R. 1957 S.C. 414, 418 (India))).

⁸⁹ *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 716 (India) (quoting *Mansell v Beck* (1956) 95 CLR 550 (Austl.)). Section 21(1) of the New South Wales Lotteries and Art Unions Act 1901 Act states: "Whosoever sells or offers for sale or accepts any money in respect of the purchase of any ticket or share in a foreign lottery shall be liable to a penalty not exceeding 25 penalty units." *Lotteries and Art Unions Act 1901* (NSW) s 21(1) (Austl.). In the Australian Constitution, the commerce clause provides: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." AUSTRALIAN CONSTITUTION s 92.

⁹⁰ See *Mansell*, 95 CLR at 596 (Austl.) ("[L]otteries were, from the moment of its first settlement, common and public nuisances and that, in general, it was impossible to conduct them except in violation of the law. Indeed it was impracticable for any person to conduct a lottery without achieving the status of a rogue and a vagabond."). It must be noted that this idea of the police powers as the power of the State to suppress nuisance or pernicious or immoral activities is one most familiar to U.S. constitutional law; we shall study this in greater detail in the Part V. See *infra* Part V. We shall also see in Part VI that before *R.M.D. Chamarbaugwala*, Chief Justice Das had made abortive attempts to import the doctrine into Indian constitutional law. See *infra* part VI.

⁹¹ Justice Taylor, equating the sale of lottery tickets to the sale of counterfeit coins or stolen goods or forged passports, stated:

[A]lthough legislation prohibiting such transactions may, possibly, be thought to be legally justifiable pursuant to what has, on occasions, been referred to as a "police power," I prefer to think that the subjects of such transactions are not, on any view, the subjects of trade and commerce as that expression is used in s. 92 and that the protection afforded by that section has nothing to do with such transactions even though they may require, for their consummation, the employment of instruments, whereby inter-State trade and commerce is commonly carried on.

doubt that it is very much the police power doctrine that he sought to import to India,⁹² to *ex ante* block morally “pernicious” activities such as gambling from falling within the purview of any type of constitutional protection.

We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance . . . and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Art. 19(1)(g).

. . . .

. . . . It is not our purpose, nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word “trade,” “business,” or “intercourse.” We are, however, clearly of opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Arts. 19(1)(g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Art. 19 (1)(g) or Art. 301 of our Constitution.⁹³

A bare reading of Chief Justice Das’ opinion makes it plain that *res extra commercium* is used in the sense of REC₂ with the constriction of Article 19(1)(g) being justified on the ground that the activity in question is immoral and noxious.⁹⁴ Chief Justice Das does not justify the *ex ante* constriction on gambling on the ground that the activity in question is covered by REC₁.⁹⁵ In

Mansell, 95 CLR at 586, 594 (Austl.) (opinion of Taylor, J.).

⁹² Chief Justice Das’s terminology of *extra commercium* seems to have misled critics because what was found in *Mansell* was the Roman law doctrine of REC₁ and not complaints that Chief Justice Das invoked the judgment wrongly. *Id.* at 550; see *infra* note 96.

⁹³ *Bombay v. R.M.D. Chamarbaugwala*, 1957 A.I.R. S.C. 699, 720 (India).

⁹⁴ The constriction of Article 19 (1)(g) is meant to narrow of the scope of the provision regarding certain activities (the ones that were purportedly immoral and noxious) and forces them to fall outside its purview. INDIA CONST. art. 19, § 1, cl. (g). This is exactly what Justice Williams had done with Section 92 i.e. the interstate trade and commerce clause and lotteries which will be argued in the next section that this is what the police power doctrine does with some fundamental rights in the U.S. Constitution. *Mansell*, 95 CLR at 550 (Austl.); See *infra* Part V.

⁹⁵ See *supra* Part III.

fact, the REC₁ conception does not figure anywhere in Chief Justice Das's judgment.⁹⁶ Chief Justice Das does not explicitly tell us which doctrine empowers him to *ex ante* prohibit an immoral activity other than quoting from Justice Williams's judgment in *Mansell v. Beck*.⁹⁷ It will be argued that the invisible hand mechanism behind Chief Justice Das's judgment was the police power doctrine—it sought to justify *ex ante* prohibitions on some activities for being repugnant to morality.⁹⁸

V. POLICE POWERS AND AMERICAN CONSTITUTIONAL LAW

A. *Two Readings of Police Powers*

This police power doctrine, originally emanating from 17th and 18th century European scholarship, but more particularly through the works of Samuel Pufendorf, William Blackstone, and Emerich de Vattel, has had a profound impact on American legal and political thought.⁹⁹ As Santiago Legarre notes, ever since Chief Justice John Marshall coined the term in *Brown v. Maryland*,¹⁰⁰ “the police power has been a pivot of American constitutional thinking.”¹⁰¹ However, for its frequent and unhesitant invocation by the courts

⁹⁶ Chief Justice Das's terminology of *extra commercium* seems to have misled critics because what was found in *Mansell v Beck* was the Roman law doctrine of REC₁, and not complaints that Chief Justice Das invoked the judgment wrongly. *Mansell v Beck* (1956) 95 CLR 550 (Austl.); M.P. SINGH, FREEDOM OF TRADE AND COMMERCE IN INDIA 115 (1985) (arguing that *Mansell v Beck* does not stand for the proposition that trade in lotteries is *res extra commercium*).

⁹⁷ *R.M.D. Chamarbaugwala*, 1957 A.I.R. S.C. at 716 (India) (citing *Mansell*, 95 CLR at 570 (Austl.)).

⁹⁸ Though this argument does not play any further role in the present paper, it would not be out of place to mention that Chief Justice Das's reliance on *Mansell v Beck* as an authority on police powers is questionable. The doctrine has been squarely rejected in several Australian High Court judgments. *See, e.g., Amalgamated Soc'y of Eng'rs v Adelaide S.S. Co.* (1920) 28 CLR 129, 146 (Austl.) (“But we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution. While in secondary and subsidiary matters they may, and sometimes do, afford considerable light and assistance, they cannot, for reasons we are about to state, be recognized as standards whereby to measure the respective rights of the Commonwealth and States under the Australian Constitution.”). “Whatever opinion we may hold as to the sufficiency of this reasoning, as applied to the United States Constitution, is really immaterial; for we have to construe the Australian Constitution.” *Roughley v New South Wales* (1928) 42 CLR 162, 197 (Austl.) (Higgins, J.) (“Moreover, in Australia we have to apply a specific provision of the constitution (Section 92), not to apply the subtle refinements of the doctrine as to ‘police power.’”).

⁹⁹ *See generally* Santiago Legarre, *The Historical Background Of The Police Power*, 9 U. PA. J. CONST. L. 745 (2007) (explaining the historical development of the police power doctrine in the judicial arena and legal scholarship).

¹⁰⁰ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827).

¹⁰¹ *See Legarre, supra* note 99, at 745.

and scholars, the exact scope of the concept of police powers and its role in American constitutional law has been found to be difficult to pin down with any precision.¹⁰² With the layers of obscurity and obfuscations it is clothed under,¹⁰³ the doctrine deserves every bit of Burgess's tag of the "dark continent" of American jurisprudence, which serves as the "repository or everything for which our juristic classifications can find no other place."¹⁰⁴

A detailed study of the police power doctrine would far outstrip the scope of this Article. Steering well clear of such an ambitious project—which we would be in no position to accomplish satisfactorily within the confines of this paper—we will endeavour here, the modest task of adumbrating briefly the contours of the doctrine only to the extent necessary to point out the aspect of police powers which Chief Justice Das has sought to imported to Indian constitutional law, and devote some detail to it. This truncated inquiry will suffice for the purposes of the project.¹⁰⁵ This task is made somewhat easier since the uses to which the Indian courts have purported to put the doctrine are limited, thus making it tolerably clear which aspect of police powers was sought to be imported.¹⁰⁶

In both scholarly literature and judicial opinions, one can discern two readings of the concept of police powers: one with a wide scope and the other with a narrow-scope.¹⁰⁷ In the wide-scope reading, the police power includes within it the sum total of the powers of government left to the states by the U.S. Constitution, thus making it co-extensive with the "residual sovereignty"

¹⁰² See, e.g., Cook, *supra* note 3, at 322 ("No phrase is more frequently used and at the same time less understood . . ."); Sax, *supra* note 3, at 36 n.6 (citations omitted) (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954)) (stating that the term "police power" has no exact definition).

¹⁰³ See Thomas Reed Powell, *The Police Power in American Constitutional Law*, 1 J. COMP. LEGIS. & INT'L L. 160 (1919) ("[S]uch remarks [that police powers is a dark continent] are helpful to readers already familiar with the toil & turmoil, which controversies over the police power have engendered. They may solace those, who have sought in vain to evolve some definition more precise. But they do not chart the way for explorers, to whom the police power is still an unknown land."). Justice Hidayatullah also quoted Reed Powell with approval in *Sheoshankar v. Madhya Pradesh*. *Sheoshankar v. Madhya Pradesh*, (1951) 52 Crim. L.J. (H.C.) 1140 (India) ("The amount of literature on 'due process' & 'police power' is colossal [sic] & the conflict in the decisions bewildering.").

¹⁰⁴ BURGESS, *supra* note 3, at 136 ("[T]he police power. . . is the 'dark continent' of our jurisprudence. It is the convenient repository of everything for which our juristic classifications can find no other place.").

¹⁰⁵ The aim of this Article is to point out the incongruity of the specific conception of police powers the Supreme Court of India sought to import with the structure of the Constitution of India.

¹⁰⁶ See *infra* Part VI.

¹⁰⁷ See Legarre, *supra* note 99, at 785–93.

of the states.¹⁰⁸ The wide-scope reading was endorsed by Chief Justice Marshall in *Brown v. Maryland* and was followed in the early federalism cases.¹⁰⁹ On the narrow-scope reading, the concept of police powers is not coterminous with the sovereignty of the states but is rather cabined in the government's power to ensure public health, safety, morals and general welfare.¹¹⁰ The narrow scope reading of the doctrine has been pressed into service in the cases involving the "takings clause."¹¹¹ This power has been thought to be an avatar of the common law power to abate nuisances.¹¹² For the

¹⁰⁸ D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 475 (2004); see also Cook, *supra* note 3, at 329. Though this reading does have many takers, it may be problematic: If police powers are equivalent to the whole gamut of residuary powers of the state, the term "police powers" is deprived of all utility as a classifying label. See Christopher Supino, *The Police Power and "Public Use": Balancing the Public Interest Against Private Rights through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711, 724 ("First, to the extent that police power is a mere synonym for state power, the term possesses almost no analytical utility . . . [a] second reason to reject this rationale is the fact that the text of the *Brown v. Maryland* and *Gibbons v. Ogden* opinions strongly suggest that Justice Marshall meant the term 'police power' to connote something vastly more limited than the entire panoply of the states' 'residual sovereignty.'" (citations omitted)) It will not, however, be the purpose of this Article to argue why the wide scope reading is unsatisfactory.

¹⁰⁹ See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 444 (1827); see also *New York v. Miln*, 36 (11 Pet.) U.S. 102, 128 (1837); *Prigg v. Pennsylvania*, 41 (16 Pet.) U.S. 539, 625 (1842); Supino, *supra* note 114 at 723,728 ;

¹¹⁰ E.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("[B]roadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public."); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560 (1991) ("The States' traditional police power is defined as the authority to provide for the public health, safety, and morals . . ."); *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) ("[T]he power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."); Christopher Wolfe, *Moving Beyond Rhetoric*, 57 FLA. L. REV. 1065, 1075 (2005) ("[T]raditional police powers . . . extend to the protection of public health, safety, welfare, and morals." (citations omitted)). The earliest use of the narrow scope of police power was in *Alger*, which was a decision by the Supreme Judicial Court of Massachusetts in 1851. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851). It was in *Alger* that the power of eminent domain was clearly distinguished from police power and this was expanded upon in *Mugler v. Kansas*, which is one of the most significant cases premised on the narrow scope reading of police powers. *Mugler v. Kansas*, 123 U.S. 623 (1887).

¹¹¹ The Fifth Amendment to the U.S. Constitution, includes the "takings clause," which provides, "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. However, where property is taken in pursuance of police powers, no compensation is payable under this clause. See generally Sax, *supra* note 3, at 36.

¹¹² See, e.g., *Munn v. Illinois*, 94 U.S. 113, 124, 147 (1876); see also David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 544 (2004). Thomas points out that "police power regulations are valid if related to preserving or protecting the public health, safety, morals, or welfare is rooted in the nuisance-suppression origins of police power." *Id.* He argues that the roots go back to the common law principle of *Sic utere tuo ut alienum non laedas*, i.e., use your own property so as not to injure another's property. *Id.* at 503; see HERBERT BROOM, A SELECTION OF LEGAL

present purpose, it is the narrow-scope reading that concerns this Part, since it is this reading, which has been in play in the takings cases and also the one sought to be imported to India.¹¹³ Accordingly, throughout the present paper the idea of police powers will be used to denote the narrow-scope concept.

B. *Mugler v. Kansas*

The early *locus classicus* of the narrow reading of police powers is *Mugler v. Kansas*.¹¹⁴ At issue in *Mugler* was the 'state of Kansas's prohibition on the sale and manufacture of intoxicating liquors.¹¹⁵

It was argued that since the claimant's breweries were erected when it was lawful to engage in the manufacture of beer and were of little value for other purposes, the regulation destroyed, or at least materially diminished, the value of that property, and thus amounted to a taking which could not constitutionally be enforced without the payment of just compensation.¹¹⁶

Writing the unanimous opinion for the court, Justice Harlan rejected this claim.¹¹⁷ Justice Harlan held that the challenged law fell within the scope of police powers since public health, public morals, and public safety, may be endangered by the general use of intoxicating drinks—which he held was a noxious use of property.¹¹⁸ As the prohibition of intoxicating liquor fell within the ambit of the police power doctrine, he argued, it would not amount to a “taking” of property, which requires just compensation.¹¹⁹ It bears emphasis that Justice Harlan's judgment rested on the proposition that the takings clause would not be attracted all:

MAXIMS, CLASSIFIED AND ILLUSTRATED 365 (1874), for a discussion of the history and ambit of the doctrine of *sic utere tuo*. See W.P. Wade, *Subjection of Private Rights to Police Power*, 6 S.L. REV. N. SERIES 59, 62 (1881), and Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970), for discussion on the relationship between *sic utere tuo* and police power.

¹¹³ In Part VI, this Article argues that it is the narrow scope reading of police powers which Chief Justice Das sought to import in *R.M.D. Chamarbaugwala* under the verbal dressing of *res extra commercium*.

¹¹⁴ *Mugler*, 123 U.S. at 623.

¹¹⁵ *Id.* at 628.

¹¹⁶ Sax, *supra* note 3, at 38; *see also* U.S. CONST. amend. V (“Nor shall any person . . . be deprived of life, liberty, or property, without due process of law.”); *Mugler*, 123 U.S. at 623.

¹¹⁷ *Mugler*, 123 U.S. at 669.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 668–70.

The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.¹²⁰

C. *Unpacking Mugler v. Kansas*

Three aspects of Justice Harlan's opinion need to be identified and kept distinct: (1) the valid subject of the exercise of police power; (2) the mode of exercise thereof of the power; and (3) the effect of a valid exercise of police powers.

1. *The Valid Subject of the Exercise of Police Power*

In examining the valid subject of exercise of police powers, Justice Harlan looks to the quality of the claimant's activity.¹²¹ Here, Justice Harlan distinguishes innocent from noxious uses.¹²² If the use of a property is "noxious," the government can abate such use, empowered by the police power doctrine, without it constituting a taking or an exercise of eminent domain.¹²³ Thus, if a regulation was held to be a valid exercise of police powers, no compensation was payable, no matter how much the regulation affected the value of private property since the action in question would not amount to a taking of property.¹²⁴

¹²⁰ *Id.* at 668–69.

¹²¹ This is typical of all judgments that endorse the narrow-scope reading of police powers, which is directed at maintaining health, safety, and morals.

¹²² *Mugler*, 123 U.S. at 669. The noxious use doctrine can be traced back to Justice Shaw's opinion in *Alger*. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 86 (1851) (Shaw, J.) (arguing that an interference with a property involved in a noxious use does not need compensation because it doesn't amount to a taking at all); see also Barros, *supra* note 108, at 481.

¹²³ See generally Sax, *supra* note 3, at 48 (arguing that the "noxious use" test "has a beguiling simplicity . . . and a perpetual appeal.").

¹²⁴ See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 395 (1915) (zoning ordinance proscribing manufacture of bricks held to not amount to taking of property even though value of land diminished almost completely); See William Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 797 (for a discussion of cases where the narrow scope of the doctrine of police powers was used.) See also ERNEST FREUND, *POLICE POWER* 268–269, 568–69 (1904).

In Justice Harlan's estimation, because the manufacture and sale of intoxicating liquor was 'a noxious use due to its detrimental effect on society, its abatement would not amount to a taking of property involving the exercise of eminent domain.¹²⁵ As such, the government would be under no obligation to compensate even if the abatement effectively stripped the property of all value.¹²⁶ William Treanor's assessment of the reasoning in *Mugler* emphasizes on this aspect of Justice Harlan's opinion: "If something was so harmful as to justify regulation under the police power, it could be regulated without compensation, regardless of the effect of the regulation on value."¹²⁷

2. *The Mode of the Exercise of Police Power*

The second aspect underlying Justice Harlan's judgment pertains to the mode used to exercise police powers.¹²⁸ Justice Harlan's police powers test turns upon whether the government has asserted a proprietary right for itself in the affected property.¹²⁹ It could amount to a "taking" only if a proprietary right was affected. Underlying Justice Harlan's reasoning is the view that the regulation in *Mugler* did not amount to a "taking," because it did not appropriate proprietary rights but merely a restricted the uses of property that are deemed to be dangerous for the community.¹³⁰ This distinction between appropriation of proprietary rights and circumscription of use of property must ultimately rest on an implicit distinction between freedoms relating to use of property and proprietary rights attached to it.¹³¹ Implicit in Justice Harlan's

¹²⁵ *Mugler*, 123 U.S. at 668–69; see generally Sax, *supra* note 3. An exercise of eminent domain, on the other hand was to be accompanied by just compensation.

¹²⁶ See *Gardner v. Michigan*, 199 U.S. 325, 330 (1905) (holding that the abatement of a noxious use is not a "taking" of property, since what is noxious can hardly be regarded as "property" at all).

¹²⁷ See Treanor, *supra* note 124, at 801

¹²⁸ This aspect of Justice Harlan's judgment assumes special significance in the context of the present Article as it will be argued later in Part VI that in *R.M.D. Charnarbagwala* Chief Justice Das seeks to employ the police power doctrine in the very same mode that *Mugler* sought to, and that such a mode of exercise of police powers is incongruous with the scheme of the Constitution of India. *Infra* Part VI.

¹²⁹ *Mugler*, 123 U.S. at 623.

¹³⁰ The first justification finds resonance in Justice Brandeis's dissenting opinion in *Mahon. Pa. Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, dissenting).

¹³¹ John Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 253 (1982) ("[A] taking of property under the just-compensation clause is almost always found when government acts impair or destroy legally actionable rights; conversely, such a taking is almost never found where the government's acts merely affect the freedom to use and enjoy."). Humbach argues, "the distinction between rights as against others and freedoms to use appears to fix the line between takings and regulation." *Id.* at 253–54. In making this distinction, Humbach relies on Wesley N. Hohfeld's celebrated taxonomy of jural relations. *Id.*

argument is that while the police powers exercised in the case affected freedoms pertaining to use of property, it did not affect the proprietary rights and hence does not amount to takings since, conceptually, takings pertain only to proprietary rights, not freedoms or liberties concerning the use of property.¹³²

To help illuminate the difference between freedom and right, it would be useful to briefly visit Wesley Hohfeld's typology of jural relations.¹³³ Hohfeld's typology comprised eight legal quantities.¹³⁴ Hohfeld believed that overused familiar terms such as "right" and "duty" conceal the difference between these eight different legal quantities.¹³⁵ Hohfeld's motivation was to disambiguate the confusion caused by the shorthand use of "rights" and "duties" for the entire range of jural relations.¹³⁶ "[C]hameleon-hued words," argued Hohfeld, "are a peril both to clear thought and lucid expression."¹³⁷

Here, we will focus on four of the legal quantities elaborated upon by Hohfeld, namely, right, duty, freedom and liberty. Hohfeld divided jural relations into sets of jural correlatives¹³⁸ and jural opposites.¹³⁹ Jural correlatives entail each other. That is to say, each pair of correlatives always exist together.¹⁴⁰ Therefore, person A with a right implies a duty in person B.¹⁴¹

¹³² *Id.* at 253–54.

¹³³ See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*]; Wesley N. Hohfeld *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); see also Nigel Simmonds, *Introduction* to W.N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING*, at ix (2001).

¹³⁴ The eight fundamental legal conceptions stemmed from Hohfeld's dissatisfaction with the idea that all the jural relations can be reduced to rights and duties. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 133, at 29. The tendency to think so, he thought, was the chief obstacle to the clear comprehension and resolution of legal issues. *Id.* Hohfeld's eight fundamental legal conceptions were *sui generis*, according to him, and were best illustrated as opposites and correlatives rather than through formal definitions. *Id.* at 30.

¹³⁵ *Id.* at 30 ("The strictly fundamental legal relations are after all *sui generis*; and thus it is that attempts at formal definition are always unsatisfactory . . .").

¹³⁶ *Id.* at 28.

¹³⁷ *Id.* at 29.

¹³⁸ *Id.* at 36.

¹³⁹ *Id.* at 30. Glanville Williams called them "contradictories" and so did a vast number of other legal philosophers. See Glanville Williams, *The Concept of Legal Liberty*, 56 COLUM. L. REV. 1129, 1135 (1956); see also Matthew H. Kramer, *Rights Without Trimmings*, in A DEBATE OVER RIGHTS 8 (Matthew H. Kramer, N. Simmonds, & Hillel Steiner eds. 2002); Philip Mullock, *The Hohfeldian Jural Opposite*, 13 RATIO 158 (1971).

¹⁴⁰ Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 166 (1919).

¹⁴¹ *Id.*; Glanville, *supra* note 145, at 1135.

Jural opposites are quantities that deny or exclude each other. None of the pairs of opposites can exist together; therefore, if *A* has a duty to do something, he cannot at the same time have the liberty to either do it or not.¹⁴² The four legal quantities we are concerned with here, namely, right, duty, liberty, and no-right, can be understood in the following scheme:¹⁴³

Right (Claim) ----- opposite of ----- No right

Right (Claim) ----- correlative of ----- Duty

Liberty (freedom) ----- opposite of ----- Duty

Liberty (freedom) ----- correlative of ----- No right

Freedom (liberty) is the antithesis or jural opposite of duty.¹⁴⁴ As long as an agent has no duty imposed by law, she has the liberty to not perform the act in question.¹⁴⁵ Explaining the correlativity of freedom and “no right,” Hohfeld points out that where one person has a liberty, another has “no right” to stop him from doing what he is doing.¹⁴⁶ And the jural opposite of liberty is duty, which means that a person’s liberty ends at the point she has a legal duty in regard to the subject matter, over which I could otherwise have exercised my liberty.¹⁴⁷ Freedom (liberty) can be understood as the natural capacity of each person to act for herself.¹⁴⁸ In the absence of natural capacity, it is pointless to speak of liberty. For instance, it would be pointless to claim that a person has the liberty to fly, because no one has the natural capacity to do so. What a person has the capacity to do, she has the liberty to do.¹⁴⁹

¹⁴² Corbin, *supra* note 140, at 166; Glanville, *supra* note 136, at 1135.

¹⁴³ See Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 133, at 30, for Hohfeld’s complete typology in tabulated form.

¹⁴⁴ The notions of freedom and liberty are used interchangeably in the Article. Hohfeld himself uses the term liberty, but we prefer the term freedom.

¹⁴⁵ *Id.* at 32, 33.

¹⁴⁶ *Id.* at 33.

¹⁴⁷ See ALBERT KOCOURECK, *JURAL RELATIONS* 15 (2d ed. 1928).

¹⁴⁸ *Id.* at 15–16.

¹⁴⁹ To use the analogy of a building structure—the walls of the structure are like duties and liberty is like the space enclosing it. The law cannot create liberties any more than the constructors can create the space enclosing the walls. The claim is that a person has the freedom to do anything that she has the natural capacity to do unless a duty is imposed by law to curtail the liberty. Thus freedom or liberty has the character of an extra legal quantity; in that in the absence of a duty specifically imposed by law the person has the legal liberty to do or abstain from doing the act in question as she pleases. This is well captured in one of those pithy aphorisms as old as the Common Law itself, which many a lawyer has internalized—“whatever is not

Justice Harlan's opinion presupposes this distinction between liberties and rights. Circumscriptions of the liberty to use property, his claim implies, is distinct from the invasion of a proprietary right. This distinction is countenanced by Hohfeld's typology.¹⁵⁰ Hohfeld unequivocally recognizes that a liberty of a property owner could be circumscribed while his proprietary rights are secure, since the two legal quantities are distinct and severable.¹⁵¹ The hypothesis that such a distinction underlies Justice Harlan's opinion gains support from Justice Brandeis's dissenting opinion in *Mahon*.¹⁵²

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety, or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious—as it may because of further change in local or social conditions—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.¹⁵³

Justice Brandeis's dissenting opinion rests on the argument that preventing a noxious use does not, in any way, impinge on the proprietary rights of the owner.¹⁵⁴ The proprietary interests of the owner survive the state circumscribing the liberty to use it. Once the circumscription on the use of the property is lifted, the owner once again has the liberty to use the property.

To be sure, the interplay of jural relations underlying Justice Harlan's opinion is somewhat obscured because imprecise language characterizes the

prohibited is permitted." The "source" of the liberty under the law is never a law; though it may be curtailed by a legal duty. See KOCURECK, *supra* note 147.

¹⁵⁰ Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 133, at 35.

¹⁵¹ *Id.*

¹⁵² The legal position set out in *Mugler* was considerably shaken by Justice Holmes' majority opinion in *Mahon*. Compare *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). *Mahon* held, contrary to *Mugler*, that even an exercise of police powers could violate the just compensation clause and amount to a taking. *Id.* Justice Brandeis's dissenting opinion, however, invokes and relies on Justice Harlan's opinion in *Mugler*. *Id.* at 416, 418 (citing *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887)). *Mahon* is discussed in greater detail later in the present section.

¹⁵³ *Mahon*, 260 U.S. 393, 416–17 (Brandeis, J., dissenting).

¹⁵⁴ *Id.*

underlying relations.¹⁵⁵ Indeed, Justice Harlan is not the only judge to have been less than precise about jural relations.¹⁵⁶ The immediate impression one may get from a reading of Justice Harlan's opinion is that he "distinguishes 'takings' from exercises of the police power by artful definition of the terms 'taking' and 'property.'"¹⁵⁷ However, this impression is inaccurate at best and misleading, at worst.¹⁵⁸

3. *The Effect of Valid Exercise of Police Power: Constriction of the Fundamental Right*

The third aspect of the effect of Justice Harlan's opinion is the constriction of the Fifth Amendment right, so that the deprivation of property by the exercise of police powers was held to fall beyond the amendment's protection against takings without just compensation.¹⁵⁹ Once a deprivation of property amounts to a taking, the obligation to pay compensation is self-executing.¹⁶⁰ One way to uphold a deprivation without payment of compensation would be to deny that it constitutes a "taking" at all.¹⁶¹ The effect of police powers is to render a certain class of activity a constitutional outcast by imposing an *ex ante* embargo and block it from falling within the ambit of a constitutionally protected right.¹⁶²

¹⁵⁵ See Humbach, *supra* note 131, at 254.

¹⁵⁶ *Id.*

¹⁵⁷ Sax, *supra* note 3, at 39.

¹⁵⁸ See *Gardner v. Michigan*, 199 U.S. 325, 330–31 (1905) (holding that the abatement of a noxious use is not a "taking" of property at all, since what is noxious can hardly be regarded as "property" at all).

¹⁵⁹ See *Mugler v. Kansas*, 123 U.S. 623, 668 (1887).

¹⁶⁰ See *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 315 (1987); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980)

¹⁶¹ David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 500 (2004) (labeling a government act as an exercise of police power automatically creates an exemption from the obligation of having to pay compensation under the Fifth Amendment).

¹⁶² See *Mugler*, 123 U.S. at 623. "Ex ante" restriction and "constriction" are terms not employed in the literature on the subject or by the courts. However, from the explanation of *ex ante* regulations as discussed in Part VI, it would be palpably clear that the effect of *Mugler* was to impose an *ex ante* regulation on the right to receive just compensation under the Fifth Amendment, thus constricting the scope of the right. See discussion *infra* Part VI.

D. Mahon: *Questioning Mugler*

The legal position set out in *Mugler* was considerably shaken by *Pennsylvania Coal Co. v. Mahon*,¹⁶³ which has been described as the “‘foundation of [American] ‘regulatory takings jurisprudence.’”¹⁶⁴ Contrary to *Mugler*, *Mahon* held that even an exercise of police powers could violate the just compensation clause and amount to a “taking.”¹⁶⁵

Mahon concerned a Pennsylvania statute prohibiting coal companies from any mining that threatened the safety of surface owners due to cave-ins.¹⁶⁶ Propounding what has come to be known as the “diminution of value” test, Justice Holmes held that a regulation that “goes too far” in reducing the value of a landowner’s property constitutes a taking and requires compensation, even when the regulation purports to be in exercise of the police power.¹⁶⁷ When a regulation turns into a taking is a question of “degree.”¹⁶⁸ Justice Holmes expressing his disquiet about Justice Harlan’s formulation of police powers observed that the police power doctrine “must have its limits or the contract and due process clauses are gone [and] private property disappears.”¹⁶⁹ Thus, *Mahon* served as the harbinger of a new takings regime.¹⁷⁰ It is still widely thought that since *Mahon*, the Supreme Court has been unable to define clearly what kind of regulations go “too far.”¹⁷¹

Justice Brandeis’s *Mahon* dissent reiterated what was essentially Justice Harlan’s view in *Mugler*.¹⁷² Reiterating the “noxious use” theory underlying

¹⁶³ Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

¹⁶⁴ Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 506, 508 (1987) (Rehnquist, C.J., Powell, O’Connor & Scalia, JJ., dissenting) (citing Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 127 (1978)).

¹⁶⁵ *Mahon*, 260 U.S. at 415–15.

¹⁶⁶ *Id.* at 412.

¹⁶⁷ *Id.* at 416 (Holmes, J.) (“We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.”).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 413.

¹⁷⁰ *See id.* at 393.

¹⁷¹ Stoebe, *supra* note 160, at 1063. “Mahon is hopelessly at odds with *Mugler*. The United States Supreme Court placed in its constitutional grab-bag a doctrine contrary to *Mugler*’s, though the Court to this day refuses to acknowledge this contradiction.” *Id.*; *see also* Treanor, *supra* note 124, at 745 (“Since that decision[Mahon], the Supreme Court has been unable to define clearly what kind of regulations run afoul of Holmes’s vague standard.”).

¹⁷² *Mahon*, 260 U.S. at 416–22 (Brandeis, J., dissenting).

Mugler,¹⁷³ Justice Brandeis opined: “The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it.” Thus, he held that the interference with property would not amount to a compensable taking.¹⁷⁴

The precise relationship between *Mahon* and *Mugler* and where that leaves the takings jurisprudence in America is a vexed issue,¹⁷⁵ which is well beyond the scope of this Article. However, there is one proposition that *Mahon* seems to have established quite unequivocally: It altogether abolished the idea of *ex ante* regulations in respect of the takings clause.¹⁷⁶ No exercise of police power could, in and of itself, qualify to block an activity from constituting a taking. This brief discussion of police powers is far from comprehensive, but it suffices for this Article. The next Part argues that in *R.M.D. Chamarbaugwala* Chief Justice Das imported the police power doctrine as understood in Justice Harlan’s opinion in *Mugler*.¹⁷⁷

VI. *RES EXTRA COMMERCIIUM*: POLICE POWERS BY ANOTHER NAME

A. R.M.D. Chamarbaugwala: *Mugler* by *Another Name*?

While introducing the notion of *ex ante* prohibition on gambling in *R.M.D. Chamarbaugwala* under the label of *res extra-commercium*, Chief Justice Das was really importing the police power doctrine, more specifically, the narrow scope conception of police powers.¹⁷⁸ While it is the invisible hand of police

¹⁷³ See *Mugler v. Kansas*, 123 U.S. 623 (1887).

¹⁷⁴ *Mahon*, 260 U.S. at 417.

¹⁷⁵ See, e.g., Sax, *supra* note 3, at 37 (“The principle upon which the cases can be rationalized is yet to be discovered by the bench: what commentators have called the ‘crazy-quilt pattern of Supreme Court doctrine’ has effectively been acknowledged by the Court itself . . .” (footnotes omitted) (quoting Allison Dunham, Griggs v. Allegheny County in *Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63)); See generally Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of “Noxious Use,” “Average Reciprocity of Advantage,” and “Bundle of Rights” from Mugler to Keystone Bituminous Coal*, 14 B.C. ENVTL. AFF. L. REV. 653 (1987); Frank I. Michelman, *Property Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967); Joseph Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1972); Stoebuck, *supra* note 160.

¹⁷⁶ *Mahon*, 260 U.S. at 416.

¹⁷⁷ See *Mugler v. Kansas*, 123 U.S. 623 (1887); *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699 (India).

¹⁷⁸ See *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 701.

powers that did all the work, it did so under the rubric of *res extra-commercium*.¹⁷⁹ Chief Justice Das had introduced the doctrine of police power through the back door, without anyone noticing it, as he dressed it with the label, *res extra-commercium*.¹⁸⁰ Now, the interesting questions that arise here include: Why did Chief Justice Das not openly argue for the police power doctrine as a justification for *ex ante* prohibitions on certain activities? Why did he have to dress the police power doctrine with the label of *res extra commercium*? Fortunately, the answers to these questions are not too far to seek.

B. Why Chief Justice Das Did Not Openly Invoke the Police Power Doctrine in R.M.D. Chamarbaugwala

At the time *R.M.D. Chamarbaugwala* was decided, the overwhelming judicial opinion was against importing the police power doctrine into India.¹⁸¹ The most significant hurdle in the way of Chief Justice Das openly invoking the police power doctrine was the Supreme Court's judgment in *Gopalan v. Madras*.¹⁸² The received wisdom of the *Gopalan* era is aptly summarized in Seervai's words, "our constitution has deliberately rejected the due process clause of the U.S. Constitution with the result that it is not necessary in India to evolve a doctrine of police power."¹⁸³

The issue in *Gopalan* was the interpretation of Article 21 of the Indian Constitution, which provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law."¹⁸⁴ In *Gopalan*, the petitioner argued that the phrase "procedure established by law"

¹⁷⁹ Though separated by centuries, Chief Justice Das's opinion in *R.M.D. Chamarbaugwala*, although not using the language of police powers, closely mirrors Samuel Pufendorf's view that regulations suppressing prodigality and gambling are valid exercises of police powers. *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 701 (India); see Legarre, *supra* note 99, at 756 ("But now this Power we are here speaking of, may, I think, be reduced properly enough to three Heads: First, to the Right of making Laws to direct such a Proportion in the Use and Consumption of certain Goods and Commodities, as the State of the Commonwealth requires. Secondly, to the Right of levying Taxes. Thirdly, to the Exercise of the *Transcendental Propriety*. . . . To the first Head we may reduce all *Sumptuary Laws* . . . Laws against Gaming, and *Prodigality* . . . As, disregard *Laws* that forbid *certain Subjects* to possess *certain Kinds of Goods* . . ." (emphasis added) (quoting SAMUEL PUFENDORF, *THE LAW OF NATURE AND NATIONS* 825–26 (1672))).

¹⁸⁰ *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 701 (India).

¹⁸¹ See *Gopalan v. Madras*, A.I.R. 1950 S.C. at 27 (India).

¹⁸² See *id.*

¹⁸³ SEERVAI, *supra* note 1, § 2.138, at 238.

¹⁸⁴ INDIA CONST. art. 21.

should be understood as incorporating a due process constraint similar to that found in the Fifth and Fourteenth Amendments to the American Constitution.¹⁸⁵ However, the Supreme Court, considering the drafting history of the Article 21 and the Constituent Assembly debates leading to it, rejected the argument.¹⁸⁶ Early drafts of Article 21 had a “due process” clause instead of the clause “procedure established by law.”¹⁸⁷ B.N. Rau, the Chief Advisor to the Constituent Assembly, was advised by Justice Felix Frankfurter against the retention of the clause, given the potential of the clause to allow judicial impediments in enforcing social legislation.¹⁸⁸ Rau argued before the Subcommittee on Fundamental Rights that over forty percent of the litigation before the U.S. Supreme Court since the turn of the 20th century pertained to the due process clause and was likely to cause a similar flood of litigation if imported to India.¹⁸⁹ There was also fear that a due process clause had the potential to privilege the “whims and vagaries of lawyers elevated to the judiciary” over the collective wisdom of the people through its elected representatives.¹⁹⁰ Finally, the drafters settled for a clause identical to the one found in the Japanese Constitution.¹⁹¹ The Supreme Court of India held that

¹⁸⁵ U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

¹⁸⁶ See generally SEERVAI, *supra* note 1, at 238 (“If American decisions need to be used with caution, doctrines evolved by the U.S. Sup. Ct. in the context of the U.S. Constitution require to be scrutinised even more carefully before introducing them into our Constitution.”).

¹⁸⁷ Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT’L L. 216, 221 (2010).

¹⁸⁸ *Id.* at 222.

Rau apparently was able to convince Ayyar, the crucial swing vote on the committee, of the potential pitfalls associated with substantive interpretation of due process, which Frankfurter had discussed extensively with Rau. Ayyar, in ultimately upholding the new position on the floor of the Assembly in December 1948, supported removing the due process clause on the grounds that substantive due process could “impede social legislation.” With the switch in Ayyar’s vote, the Drafting Committee endorsed Rau’s new preferred language-replacing the due process clause with the phrase according to the procedure established by law

Id. This social legislation included legislation involving redistribution of resources, as well as legislation pertaining to a minimum-wage, workweek hours, and debt alleviation. 5 B. SHIVA RAO, *THE FRAMING OF INDIA’S CONSTITUTION* 233 (2004).

¹⁸⁹ RAO, *supra* note 188, at 232.

¹⁹⁰ *Id.* at 234.

¹⁹¹ Compare INDIA CONST. art. 21 (“No person shall be deprived of his life or personal liberty except according to *procedure established by law.*” (emphasis added)), with NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 31 (Japan) (“No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to *procedure established by law.*” (emphasis added)); see also GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 131 (1966).

since the due process clause doctrine was expressly rejected, the police power doctrine was also automatically rejected by the makers of the Constitution of India.¹⁹² The Supreme Court in *Gopalan* understood that due process clause and the police power doctrines operated in tandem, with one acting as a counterbalance to the other.¹⁹³

The discussion of the meaning of “due process of law” found in Willis on Constitutional Law and in Cooley’s Constitutional Limitations shows the diverse meanings given to that expression at different times and under different circumstances by the Supreme Court of U.S.A so much so that the conclusion reached by these authors is that the expression means reasonable law according to the view of the majority of the judges of the Supreme Court at a particular time holding office. It also shows how the meaning of the expression was widened or abridged in certain decades. Moreover, to control the meaning so given to that expression from time to time the police power doctrine was brought into play. That doctrine, shortly put, is that legislation meant for the good of the people generally, and in which the individual has to surrender his freedom to a certain extent because it is for the benefit of the people at large, has not to be tested by the touchstone of the “due process of law” formula.¹⁹⁴

[W]hen that power was threatened with prostration by the excesses of due process, the equally vague and expansive doctrine of “police power,” i.e., the power of Government to regulate private rights in public interest, was evolved to counteract such excesses Roughly speaking, police power may be defined as “a [sic] right of a Government [sic] to regulate the conduct of its people in the interests [sic] of public safety, health, morals[,] [sic] and convenience”¹⁹⁵

The *Gopalan* court held that both the due process and the police power doctrines have no place in the context of Article 21. “[F]inally, it will be incongruous to import the doctrine of due process of law without its palliative, the police power doctrine. It is impossible to read the last mentioned doctrine into [A]rticle 21.”¹⁹⁶

¹⁹² SEERVAI, *supra* note 1, at 238.

¹⁹³ *See id.* at 239.

¹⁹⁴ *Gopalan v. Madras*, A.I.R. 1950 S.C. 27, 38 (India).

¹⁹⁵ *Id.* 72–73, 100 (quoting WILLIAM BENNETT MUNRO, *THE GOVERNMENT OF THE UNITED STATES: NATIONAL, STATE, AND LOCAL* 522 (5th ed. 1946)).

¹⁹⁶ *Id.* at 118.

Gopalan loomed large over the Supreme Court for nearly three decades before it was dislodged on some crucial aspects in *Maneka Gandhi v. Union of India*,¹⁹⁷ though the foundations for such a change could be thought to have been laid down in *Cooper v. Union of India* in 1969.¹⁹⁸ Following *Cooper*, the Supreme Court in *Maneka Gandhi* held that the protection under Article 21 includes a substantive protection against unreasonable deprivation of liberty. Later, in *Sunil Batra v. Union of India*, Justice Krishna Iyer pointed out that though the Constitution had no “due process” provision, yet “after . . . *Maneka Gandhi* the consequence is the same.”¹⁹⁹ Whatever view one takes of Article 21 and the due process clause, and its relationship to the police power doctrine, at the time Chief Justice Das handed down the judgment in *R.M.D. Chamarbaugwala*, the jurisprudential climate was positively hostile to planting the seeds of the police power doctrine.²⁰⁰ In his 1951 *Sholapur Mills* decision, Justice Bose strongly opposed the import of the concept of police power into India in these words: “I deprecate . . . the use of doubtful words like ‘police power,’ ‘social control,’ ‘eminent domain’ and the like.”²⁰¹ Likewise, in 1954, Chief Justice Sastri in *West Bengal v. Bose*²⁰² ruled out any use of the Police Powers doctrine:

The American doctrine of police power as a distinct and specific legislative power is not recognised in our Constitution²⁰³

To the same effect is Justice Mukerjea’s 1954 opinion in *Chowdhury v. Union of India*:

¹⁹⁷ *Gandhi v. Union of India*, A.I.R. 1978 S.C. 597 (India).

¹⁹⁸ *Cooper v. Union of India*, A.I.R. 1970 S.C. 564 (India).

¹⁹⁹ *Batra v. Delhi Admin.*, A.I.R. 1978 S.C. 1675 (India).

²⁰⁰ Does this mean that because *Gandhi* has read Article 21 to include the *due process clause*, the path for the entry of the police power doctrine in the Constitution has now been cleared? No such conclusion need follow at all. It must be noted, that though the language of *due process* that was used by Justice Krishna Iyer, the point of the court’s decision was to introduce substantive constraints on the government’s power to circumscribe the right to life. *Gandhi v. Union of India*, A.I.R. 1978 S.C. 597 (India). *Gopalan* had denied any such constraints. *Gopalan v. Madras*, A.I.R. 1950 S.C. 27, 118 (India). From this it does not follow that an elaborate package of police powers and due process jurisprudence ought automatically be imported to India. In any event, *Gandhi* was a decision on Article 21, which does not have reasonable restrictions clause unlike Article 19 which did have a reasonable restrictions clause. Hence, if there is any scope for a police power doctrine under the law as altered by *Gandhi*, it will be in relation to Article 21 alone. Not in relation to Article 19(1) which has reasonable restrictions under Article 19(2) to 19(6). See INDIA CONST. arts. 19, 21; *Gandhi v. Union of India*, A.I.R. 1978 S.C. 597 (India).

²⁰¹ *Shrinivas v. Sholapur Spinning & Weaving Co.*, A.I.R. 1954 S.C. 119, 137 (Bose J., concurring) (India).

²⁰² *W. Bengal v. Bose*, A.I.R. 1954 S.C. 92 (1953) (India).

²⁰³ *Id.* at 92, 98.

In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution makers and the importing of expressions like “police power,” which is a term of variable and indefinite connotation in American law can only make the task of interpretation more difficult.²⁰⁴

Chief Justice Das in *R.M.D. Chamarbaugwala* would have been in no position to introduce the police power doctrine as this would have meant him overruling many landmark rulings of the Supreme Court that were dominant at the time and were handed down by Supreme Court benches larger than the one in *R.M.D. Chamarbaugwala*.²⁰⁵ Additionally, Chief Justice Das had, on an earlier occasion, made a futile attempt to introduce the police power doctrine, which came under criticism from his brethren on the Supreme Court.²⁰⁶

C. Chief Justice Das’s Earlier Attempt to Introduce the Police Power Doctrine and the Supreme Court’s Reaction

Prior to *R.M.D. Chamarbaugwala*, Chief Justice Das had made one, though feeble, attempt to introduce the American police power doctrine in *Chowdhary v. Union of India*.²⁰⁷ In *Chowdhary*, he attempted to explicitly introduce the doctrine without dressing it under the verbiage of *res extra commercium*.²⁰⁸ Although *obiter dictum*, this attempt came under criticism from Chief Justice Sastri in *Bose*.²⁰⁹

At issue in *Chowdhary* was a statute nationalizing one of India’s largest textile mills in the wake of some labour disputes and a subsequent disruption in operations.²¹⁰ The statute was constitutionally challenged under Articles 14, 19(1)(f) and Article 30. Article 14, the equality clause, is comparable to the equal protection clause of the Fourteenth Amendment to the U.S.

²⁰⁴ *Chowdhary v. Union of India*, A.I.R. 1951 S.C. 41, 50, 56 (Mukerjea, J., dissenting) (India).

²⁰⁵ *See, e.g., Gopalan v. Madras*, A.I.R. 1950 S.C. 27, 118 (India); *Bose*, A.I.R. 1954 S.C. at 92 (India); *Chowdhary*, A.I.R. 1951 S.C. at 56.

²⁰⁶ *See Chowdhary*, A.I.R. 1951 S.C. at 59 (Das, C.J., dissenting).

²⁰⁷ *Chowdhary*, A.I.R. 1951 S.C. 63–65. As it will be argued later, Chief Justice Das’s observations on the issue of police powers are *obiter dictum*. *See infra* note 225. This attempt received criticism from Justice Sastri in *Bose* since the Attorney General, appearing for the government, canvassed an argument identical to the one advanced by Chief Justice Das in *Chowdhary*.

²⁰⁸ *Id.*

²⁰⁹ *See infra* text accompanying notes 225–28.

²¹⁰ *Chowdhary*, A.I.R. 1951 S.C. at 41, 45–46.

Constitution.²¹¹ Article 19(1)(f) provided that citizens shall be free to use and dispose property.²¹² Article 31 was the equivalent of the Takings Clause from the U.S. Constitution.²¹³ As Chief Justice Das's views on Article 31 will assume special significance in this Article—indeed, Chief Justice Das initially imported police powers through a *Mugler*-like interpretation of Article 31—it would not be out of place to discuss it in some detail. Article 31(1) provided that no person could be deprived of his property without the authority of law.²¹⁴ Article 31(2) provided that:

No property . . . shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given.²¹⁵

Chief Justice Das read Articles 31(1) and 31(2) as “mutually exclusive.”²¹⁶ He read Clause (2) as “imposing limitations only on two particular kinds of deprivation of private property, namely, those brought about by acquisition or taking possession thereof,” and Clause (1) as “authorising all other kinds of deprivation with no limitation except that they should be authorised by law.”²¹⁷ Chief Justice Das purported to introduce that property taken in the exercise of police powers would not amount to a taking of property, and takings are only covered by Article 31(2) but exercises of police power are covered under Article 31(1).²¹⁸

²¹¹ Compare INDIA CONST. art. 14 (“Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”), with U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

²¹² INDIA CONST. art. 19, § 1, (f). The use of past tense is deliberate. Article 19(1)(f) was deleted in 1978 and Article 31 was amended in 1954. The Constitution (Forty-Fourth Amendment) Act, 1978, § 2, *repealing* INDIA CONST. art. 19, § 1, cl. (f); The Constitution (Fourth Amendment) Act, 1955, § 2, *amending* INDIA CONST. art. 31, § 2. The subsequent history of these provisions is immaterial for the purposes of this paper.

²¹³ Compare INDIA CONST. art. 31, § 2, *repealed by* The Constitution (Fourth Amendment) Act, 1955, § 2 ([N]o property . . . shall be taken . . . or acquired for public purposes under any law . . . unless the law provides for compensation for the property taken . . .”), with U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”)

²¹⁴ INDIA CONST. art. 31 § 1.

²¹⁵ *Id.* art. 31, § 2, *repealed by* The Constitution (Fourth Amendment) Act, 1955, § 2.

²¹⁶ *W. Bengal v. Bose*, A.I.R. 1954 S.C. 92, 96–97 (India).

²¹⁷ *Id.*

²¹⁸ *Chowdhary v. Union of India*, A.I.R. 1951 S.C. 41, 63 (India).

One can conceive of circumstances where the State may have to deprive a person of his property without acquiring or taking possession of the same. For example, in any emergency, in order to

In effect, Chief Justice Das argues that a deprivation of a property in exercise of police powers is not a taking at all and would fall outside the constitutional protection of Article 31 because Article 31(1) does not offer any protection at all.²¹⁹ In support of the proposition, Chief Justice Das explicitly and ostensibly relies on the U.S. Supreme Court's decision in *Mahon*.²²⁰ Oddly, however, the proposition he really relied on is closer to Justice Brandeis's dissenting opinion than Holmes' majority opinion, and therefore, closer to *Mugler*.²²¹ In *Mahon*, Justice Brandeis, relying on *Mugler v. Kansas*, argued that no exercise of police powers could ever amount to an exercise of eminent domain.²²² Hence, though he does not do so ostensibly, in *Chowdhary*, Chief Justice Das obliquely relies on *Mugler* rather than *Mahon*.²²³

In *W. Bengal v. Bose*, Chief Justice Sastri regarded Chief Justice Das' views on Article 31 as *obiter dictum* and justified the statute under the police power doctrine but nevertheless struck down the statute for violating Article 14.²²⁴ Nevertheless, he agrees with Chief Justice Das on Article 31 because the Attorney General had adopted the gist of Chief Justice Das's opinion in his

prevent a fire spreading, the authorities may have to demolish an intervening building. This deprivation of property is supported in the United States of America as an exercise of "Police Power." This deprivation of property is different from acquisition or taking of possession of property which goes by the name of "Eminent Domain" in the American Law. The construction suggested implies that our Constitution has dealt with only the law of "Eminent Domain", but has not provided for deprivation of property in exercise of "Police Powers." I am not prepared to adopt such construction, for I do not feel pressed to do so by the language used in Art[icle] 31. On the contrary, the language of cl[ause] (1) of Art[icle] 31 is wider than that of cl[ause] (2), for deprivation of property may well be brought about otherwise than by acquiring or taking possession of it. I think cl[ause] (1) enunciates the general principle that no person shall be deprived of his property except by authority of law, which, put in a positive form, implies that a person may be deprived of his property, provided he is so deprived by authority of law. No question of compensation arises under cl[ause] (1).

Id. A similar argument underlies the takings regime led by *Mugler v. Kansas*. Indeed, it will be argued, Chief Justice Das's argument closely mirrors Justice Harlan's in *Mugler*.

²¹⁹ *Id.*

²²⁰ *Id.* at 63–64 (citing *Pa. Coal Co. v. Mahon*, 123 U.S. 393 (1922)).

²²¹ See *Mugler v. Kansas*, 123 U.S. 623 (1887). Ironically, it is Chief Justice Sastri's opinion in *Bose* expressly rejecting Chief Justice Das's reasoning that identical to Justice Holmes's opinion in *Mahon*.

²²² *Pa. Coal Co. v. Mahon*, 123 U.S. 393, 417 (1922) (Brandeis, J., dissenting). Justice Holmes had brought this proposition into question by holding that when exercise of police powers went too far, it would amount to a taking and hence was an exercise of eminent domain. *Id.* at 415 (majority opinion).

²²³ For Indian judgments prior to *Chowdhary*, albeit not of the Supreme Court of India that do rely on *Mugler* specifically, see *infra* text accompanying notes 242–46.

²²⁴ *W. Bengal v. Bose*, A.I.R. 1954 S.C. 92, 96 (India).

argument.²²⁵ Chief Justice Sastri, in terminology not very different from that used by Justice Holmes in *Mahon*, argued:

There are several objections to the acceptance of this view. But the most serious of them all is that it largely nullifies the protection afforded by the Constitution to rights of private property and, indeed, stultifies the very conception of the “right to property” as a fundamental right.²²⁶

Chief Justice Sastri, also, in no uncertain terms, expressed his disquiet about the police power doctrine, which Chief Justice Das claimed, formed the basis of Article 31.

[A]ccording to Das J’s. reading of that clause, the Constitution-makers have provided for no indemnification of the expropriated owner. Why ? Because, it is said, deprivation under cl[ause] (1) is an exercise of “police power.” This, to my mind, is fallacious. You first construe the clause as conferring upon the State acting through its Legislature unfettered power to deprive owners of their property in all other cases except the two mentioned in cl[ause] (2), and then seek to justify such sweeping and arbitrary power by calling it “police power.”²²⁷

Justice Sastri’s disquiet with the police power doctrine resonated with Justice Bose, who argued:

With the utmost respect I deprecate, as I have done in previous cases, the use of doubtful words like “police power”, “social control”, “eminent domain” and the like. I say doubtful, not because they are devoid of meaning but because they have different shades of meaning in different countries and because they represent powers which spring from widely differing sources. In my opinion, it is wrong to assume that these powers are inherent in the State in India and then to see how far the Constitution regulates and fits in with them.²²⁸

It will be argued in the next Part that despite the weight of authority stacked up against the implant of the doctrine in the constitutional law of India, Chief

²²⁵ *Id.*

²²⁶ *Id.* at 97.

²²⁷ *Id.*

²²⁸ *Shrinivas v. Sholapur Spinning & Weaving Co.*, A.I.R. 1954 S.C. 119, 137 (India). *See generally* Suchindran Baskar Narayan, *Vivian Bose and the Living Constitution: A Tribute*, 5 INDIAN J. CONST. L. 1, 3 (2011).

Justice Das never abandoned the police power doctrine. In *R.M.D. Chamarbaugwala*, he brought back the police power doctrine, now in the context of Article 19(1)(g) and made as an *ex ante* constriction of that provision.²²⁹ However, this time he did not refer to it openly as police powers; he called it *res extra commercium* instead.

D. R.M.D. Chamarbaugwala: Mugler *Reincarnate*

When *R.M.D. Chamarbaugwala* came up for consideration, the jurisprudential climate was hostile for planting the seeds of the police power doctrine into Indian constitutional law. Thus, Chief Justice Das could not have just imported the doctrine without overruling several landmark Indian judgments, a practically impossible task.²³⁰ In fact, given that *Gopalan* was decided by a bench larger than the one deciding *R.M.D. Chamarbaugwala* and *Bose* was decided by a bench equal to *R.M.D. Chamarbaugwala*, *R.M.D. Chamarbaugwala* could not have overruled either of those judgments critical of the police power doctrine.²³¹ In what bears all appearances of having been a way around the embargo, Chief Justice Das introduced the very same concept, albeit clothed in a different linguistic dressing.²³² Chief Justice Das' was a subtle semantic gambit and going by the subsequent history of *res extra commercium* in India, one would have to conclude—a successful one.²³³ Rather than argue for the police power doctrine, with the very likely consequence of finding himself in a minority, he silently brought in it, by labelling it as *res extra-commercium*.²³⁴

While introducing the notion of *ex ante* prohibition in respect of gambling in *R.M.D. Chamarbaugwala* under the label of *res extra-commercium*, Chief

²²⁹ *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, [] (India).

²³⁰ Unlike the U.S. Supreme Court where the full strength of the bench sits to hear cases, the Supreme Court of India typically hears cases in benches of two or three (called division bench) or benches of five or more (constitution benches). A case can only be overruled by a bench of larger strength. *R.M.D. Chamarbaugwala*, which was a judgment of a five judge bench of the Supreme Court, could not have overruled the judgments speaking against police powers. Moreover, although all of this remains in the realm of conjecture, it is probably safe to assume that a unanimous judgment—which is what Chief Justice Das got in *R.M.D. Chamarbaugwala*—would have been impossible had he invoked the police power doctrine.

²³¹ *Gopalan* was decided by a full strength of the Supreme Court which in 1950 was six judges. *Bose* was decided by a bench of five judges, which was also the strength of the bench deciding *R.M.D. Chamarbaugwala*.

²³² Datar, *supra* note 4, at 146.

²³³ *Id.* at 146–47.

²³⁴ *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 701, 720.

Justice Das was importing the police power doctrine, or to be more precise, a certain conception of that doctrine.²³⁵ The specific conception of police powers that Chief Justice Das imported seems to have been the one advanced by Justice Harlan in *Mugler*.²³⁶ While it is the invisible hand of police powers that did all the work, it did so under the rubric of *res extra commercium* (REC₂). Police powers as understood by Justice Harlan acted as an *ex ante* regulation on the takings clause. Chief Justice Das' REC₂, also, too made police powers act as an *ex ante* regulation of the freedom of trade under Article 19(1)(g) of the Constitution of India.²³⁷ *Mugler's* effect was to declare that an exercise of police powers blocked *ex ante* the subject of its exercise from invoking the constitutional protection under either the takings clause or the due process clause, *R.M.D. Chamarbaugwala's* effect was to declare that an exercise of police powers blocked *ex ante* the subject of its exercise from invoking the constitutional protection under Article 19(1)(g) of the Constitution of India.²³⁸

To be sure, Chief Justice Das does not even on one occasion use the phrase police powers in the original his opinion—he only uses it derivatively while quoting from Justice Williams' opinion in *Mansell v Beck*²³⁹—let alone openly invoke *Mugler*.²⁴⁰ However, the effect Chief Justice Das seeks to achieve with the doctrine of *res extra commercium* leaves us in little doubt that it is conception of police powers propounded in *Mugler* that is sought to be invoked, although silently.²⁴¹ The *effect* achieved by the police power doctrine in *Mugler* is achieved by the doctrine of REC₂ in India. There are however two Indian High Court opinions (both rendered by Justice Hidayatullah) that rely openly on *Mugler* and use police powers as a constriction of Article 19: one is the Nagpur High Court's decision in *Sheoshankar v. Madhya Pradesh*,²⁴² and the other, the Madhya Pradesh High Court's decision in *Buntasingh v. Madhya*

²³⁵ Datar, *supra* note 4, at 146–47.

²³⁶ *Mugler v. Kansas*, 123 U.S. 623, 646 (1887).

²³⁷ See *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 720–21; see also Kaushal v. Union of India, 1978 A.I.R. 1978 S.C. 1457, 1473 (India) (Krishnaiyer, J.) (recognizing the noxious use doctrine as the basis of police powers).

²³⁸ *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 701, 720–21.

²³⁹ *Id.* at 716 (“It is important to observe the distinction that gambling is not trade, commerce and [sic] intercourse within the meaning of S. [sic] 92 otherwise the control of gambling in Australia would be attended with constitutional difficulties.” (citing *Mansell v Beck* (1956) 95 CLR 550, 570 (Austl.))).

²⁴⁰ See generally *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699.

²⁴¹ *Id.*

²⁴² *Sheoshankar v. Madhya Pradesh* (1951) Crim. L.J. (Bombay H.C.) 1140 (1951) (India). Interestingly, the judgment in *Sheoshankar* was never challenged in the Supreme Court.

Pradesh.²⁴³ In *R.M.D. Chamarbaugwala*, Chief Justice Das seems to have readily adopted this template provided by *Sheoshankar*.²⁴⁴ Seervai points out that the noxious use theory underlies the decision of the court in *Sheoshankar*.²⁴⁵

VII. TALKING PAST EACH OTHER

What really *ought* to be at stake when one judge argues for *res extra commercium* type regulation and another other opposes it, is the question of whether the police power doctrine and *ex ante* regulation premised on the doctrine are permissible in the scheme of the Constitution of India. Instead what we find is that the adherents and detractors of the doctrine, while apparently disagreeing over *res extra commercium* have just been talking past each other. The detractors of *res extra commercium* have all along believed that it is the REC₁ conception which Chief Justice Das sought to introduce and have argued, over the decades, that the Roman conception of *res extra commercium* simply cannot create restrictions on any activity in the name of morality.²⁴⁶ On the other hand, the supporters of the doctrine have not made the least attempt to justify how the police power doctrine—which is the invisible hand mechanism behind their conception of *res extra commercium* (REC₂)—can be accommodated within the scheme of the Indian Constitution.²⁴⁷ There is a heavy theoretical price that has had to be paid for this misunderstanding: the police power doctrine and the *ex ante* constrictions premised thereupon have come to become ensconced as a part of the Constitution of India²⁴⁸ without the least judicial debate or reflection.²⁴⁹ Later,

²⁴³ *Bantasingh v. Madhya Pradesh*, A.I.R. 1958 (M.P. H.C.) 193 (March 29, 1957) (India).

²⁴⁴ *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 720–22. However, unlike Justice Hidayatullah, Chief Justice Das does not openly invoke either *Mugler* or the police power doctrine.

²⁴⁵ SEERVAI, *supra* note 1, at 696.

²⁴⁶ *See, e.g., Narula v. Jammu & Kashmir*, A.I.R. 1967 S.C. 1368, 1371–72 (India).

²⁴⁷ *See, e.g., Nashirwar v. Madhya Pradesh*, (1975) 2 S.C.R. 861 (1974) (India).

²⁴⁸ The police power doctrine has gone well beyond the scope of *res extra commercium* and has been applied in areas as diverse as law and order and planning regulations. *See, e.g., Comm'r of Police v. Avadhuta*, (2004) 2 S.C.R. 1019 (India); *Friends Colony Dev. Comm. v. Orissa*, A.I.R. 2005 S.C. 1 (India).

²⁴⁹ *See Datar, supra* note 4, at 140–41.

This wrongful application of police powers has continued till date. The police power doctrine has been repeatedly followed in a number of cases

. . . .

. . . . [s]ubsequent cases have blindly accepted this doctrine without deliberating whether the theory of police power would be necessary in the light of Articles 19(2) to 19(6) in India.

in Part X it will be argued that structure of the fundamental right under Article 19 does not allow the imposition of any *ex ante* constrictions of the sort advocated by Chief Justice Das.

This “talking past” each other began in 1967 in *Narula* where Chief Justice Subba Rao resisted the extension of *ex ante* prohibition on gambling in *R.M.D. Chamarbaugwala* to trade in intoxicating liquor.²⁵⁰ The government argued that the *ex ante* prohibition which was imposed on gambling in *R.M.D. Chamarbaugwala* must be extended to trade in intoxicating liquor as well.²⁵¹ The government’s argument being that the sale of intoxicating liquor was morally repugnant and that Chief Justice Das’ judgment has purchase against any immoral activity—the sale of intoxicating liquor being one of them.²⁵² In his judgment in *Narula*, Chief Justice Subba Rao made—what he should no doubt have thought to be—telling arguments against Chief Justice Das’s judgment in *R.M.D. Chamarbaugwala*. Chief Justice Subba Rao appears to bring into question the REC₁ concept of *res extra commercium* and directed all his critical energies at unpacking the concept and casting doubt on the moral prohibitory task that he took Chief Justice Das to have charged it with.²⁵³ Chief Justice Subba Rao appears to have been under the impression that Chief Justice Das had used the REC₁ conception of *res extra commercium* to justify *ex ante* restrictions on gambling,²⁵⁴ only to find that it was could not accomplish any of the moral prohibitory tasks that he thought Chief Justice Das had assigned to it.²⁵⁵ Chief Justice Subba Rao went straight into an investigation of whether there was any conceptual embargo in the ownership and alienation of alcohol and held that, conceptually, because alcohol is capable of being owned and alienated, it cannot be *res extra commercium* and thus cannot be excluded from Article 19 protection by an *ex ante* control.²⁵⁶ He states: “[I]f the activity of a dealer, say, in ghee is business; then how does it cease to be business if it is in liquor?”²⁵⁷ Now, while Chief Justice Subba Rao was right about the fact that there is nothing conceptually problematic about ownership and sale of alcohol and that REC₁ does not come in the way of “trade” in alcohol, one fears that

Id. at 140–41 (footnote omitted).

²⁵⁰ *Narula v. Jammu & Kashmir*, A.I.R. 1967 S.C. 1368, 1371–72 (India).

²⁵¹ *Id.* at 1371.

²⁵² *Id.* at 1368–69.

²⁵³ *Id.*

²⁵⁴ *Id.* at 1373.

²⁵⁵ *Id.* at 1371–72.

²⁵⁶ *Id.* at 1368–69.

²⁵⁷ *Id.* at 1369

Chief Justice Subba Rao was not really offering a real counter-argument to Chief Justice Das' theory of *ex ante* regulation; rather they were just talking past one another.²⁵⁸ Chief Justice Das had meant to use the REC₂ conception of the doctrine of *res extra commercium*, with the police power doctrine being the invisible hand mechanism accomplishing the moral prohibitory task.²⁵⁹ Chief Justice Subba Rao and Chief Justice Das were working with different definitions while apparently arguing about, and disagreeing over, the same issue.²⁶⁰ Chief Justice Subba Rao and Chief Justice Das though apparently in disagreement, were in reality talking past one another as they were working with different conceptions of *res extra commercium*.²⁶¹

The real issue at stake was not whether there is a conceptual embargo on the ownership and alienation of alcohol but whether the scheme of the Indian Constitution allows for the police power doctrine imposing *ex ante* regulations on certain activities by constricting the scope of Article 19(1)(g).²⁶² Chief Justice Subba Rao thought the puzzle lay with examining the exact scope of the Roman law doctrine of *res extra commercium*. He believed that discrediting *res extra commercium* was all that was needed to lend a telling blow to the scheme of *ex ante* constriction of fundamental rights under Article 19 attempted by Chief Justice Das.²⁶³ Five decades on, this very misunderstanding persists.²⁶⁴

Judgments of the Supreme Court after *Nashirwar*²⁶⁵ have uniformly upheld *ex ante* regulation on trade in intoxicating liquor including a constriction of Article 19(1)(g) and no judge, until very recently, has seriously opposed the idea.²⁶⁶ It is only very recently that some voices have been heard against this well-entrenched doctrine.²⁶⁷ In the last decade, Justice Sinha has been the most

²⁵⁸ *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, [] (India).

²⁵⁹ *Id.*

²⁶⁰ *Narula*, A.I.R. 1967 S.C. at 1371; *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 720.

²⁶¹ *Narula*, A.I.R. 1967 S.C. at 1371; *R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. at 720.

²⁶² *Narula*, A.I.R. 1967 S.C. at 1371.

²⁶³ *Punjab v. Devans Modern Breweries*, (2004) 11 S.C.C. 26. (India).

²⁶⁴ *Id.*

²⁶⁵ *Nashirwar v. Madhya Pradesh*, (1975) 2 S.C.R. 861 (1974) (India).

²⁶⁶ *Punjab v. Devans*, (2004) 11 S.C.C. 26.

²⁶⁷ The doctrine was questioned only once between the 70's until the last decade, but the questioning was a tentative and hesitant one. See *Kaushal v. Union of India*, 1978 A.I.R. 1978 S.C. 1457 (India). Justice Krishna Iyer at one place argues "Any government with worker's weal and their families' survival at heart will use its 'police power' under Article 19(6) read with section 59(f)(v) of the Act to forbid alcohol sales on pay days." *Id.* at 124. While also maintaining that "[w]hile the police power as developed in the American juris-

vociferous critic of this scheme of *ex ante* regulation.²⁶⁸ He has expressed his doubts about the soundness of *ex ante* regulation brought about by the doctrine in a few judgments,²⁶⁹ notably, *Devans Breweries*.²⁷⁰ Alas, one fears that he too might be tilting at a straw man.²⁷¹

Justice Sinha argues that the doctrine of *res extra commercium*, which he identifies with the Roman law doctrine, cannot justify the imposition of *ex ante* constrictions on the fundamental right to trade in alcohol.²⁷² Justice Sinha directs his criticism against the REC₁ concept of *res extra commercium* pointing out the inadequacies of the doctrine would automatically have critical purchase against this scheme of *ex ante* prohibition.²⁷³ However, though Justice Sinha's view on the concept of *res extra commercium* may be right, the soundness of the Roman law concept of *res extra commercium* is actually besides the point in the debate. Even establishing conclusively that REC₁ is wholly inapplicable to activities, such as trade in liquor or gambling, will still leave the central puzzles about *res extra commercium* intact. It would still remain an open question whether such *ex ante* regulation of certain activities by a constriction of Article 19(1)(g) is permissible by the scheme envisaged in the Constitution of India. Furthermore, as the invisible hand mechanism behind Chief Justice Das' invocation of *res extra commercium* was the police power doctrine, the real issue at stake was whether the police power doctrine could be invoked to constrict the scope of Article 19.²⁷⁴ Perhaps most of this confusion surrounding *res extra commercium* could have been avoided had Chief Justice Das been forthcoming in *R.M.D. Chamarbaugwala* and spelt out that he was importing the police power doctrine in the Indian Constitution.²⁷⁵ Of course,

prudence and constitutional law, may not be applicable in terms to the Indian Constitutional law, there is much that is common between that doctrine and the reasonableness doctrine under Art. 19 of the Indian Constitution." *Id.* at 148.

²⁶⁸ *Action Comm., Unaided Pvt. Schs. v. Dir. of Educ., Delhi*, (2009) 12 S.C.R. 289 (India); *Garg v. Hotel Assoc. of India*, (2007) 12 S.C.R. 991 (India); *Punjab v. Devans*, 11 S.C.C. 26.

²⁶⁹ *See Garg*, (2007) 12 S.C.R. at 1007–08. Here, Justice Sinha restricted the applicability of the doctrine of *res extra commercium* by holding that even if trade in liquor were to be *res extra commercium*, it does not render contracts employment contracts pertaining to serving liquor, illegal or contrary to public policy. *Id.*

²⁷⁰ *Punjab v. Devans*, 11 S.C.C. 26.

²⁷¹ Justice Sinha does note in passing that underlying the doctrine of *res extra commercium* is the police power doctrine. But he does nothing to question the incongruity of the doctrine in the scheme of the constitution of India. *Id.*

²⁷² *Id.* at 118.

²⁷³ *Id.* 118, 134.

²⁷⁴ *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, 712 (India).

²⁷⁵ *Id.*

that would have meant that the doctrine could never have been successfully imported from American constitutional law, given the opposition to it at the time.²⁷⁶

It was only two decades later in *Nashirwar* that it was more specifically spelt out that the basis of the *ex ante* regulation of Article 19 is indeed the police power doctrine.²⁷⁷

There are three principal reasons to hold that there is no fundamental right of citizens to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous goods. Second, there is power of the State to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. . . . Third, the history of excise law in India shows that the State has the exclusive right or privilege of manufacture or sale of liquor.²⁷⁸

In *Shankar*, Justice Chandrachud's judgment clarified that the invisible hand mechanism behind the *ex ante* regulation of Article 19 in the context of trade in liquor was the police power doctrine.²⁷⁹ He did this by holding that the justification for trade in liquor falling outside the purview of Article 19(1)(g) was the "police powers" doctrine imported from American constitutional law.²⁸⁰ However, this acknowledgement by Justice Chandrachud was not accompanied by any justification for the basis of the police power doctrine.²⁸¹ Nor was there the least attempt to counter the myriad earlier rulings of the Supreme Court of India which had, in no uncertain terms, expressed their disquiet with the import of the police powers doctrine into the Indian Constitution.²⁸² With *Harshankar*, it was clear that despite the staunch resistance to the police power doctrine by the Indian Supreme Court, it had entered and had got ensconced in Indian constitutional law, without the least

²⁷⁶ See *supra* Part VI.

²⁷⁷ *Nashirwar v. Madhya Pradesh*, (1975) 2 S.C.R. 861 (1974) (India).

²⁷⁸ *Id.*

²⁷⁹ *Shankar v. Dy. Excise & Tax'n Comm'r*, (1975) 3 S.C.R. 271 (India).

²⁸⁰ *Id.*

²⁸¹ *Id.* at 277. Justice Chandrachud places reliance on *Nashirwar*. However, even in *Nashirwar* there was no justification for the basis of importing the police power doctrine into the Constitutional law of India. See *Nashirwar v. Madhya Pradesh*, (1975) 2 S.C.R. 861 (1974) (India).

²⁸² See *supra* Subpart VI.B. On the contrary, Justice Chandrachud argues that police power is a well-accepted and settled doctrine of Indian constitutional law and it was *Narula* which had struck a discordant note. Needless to say, there was little evidence to support Justice Chandrachud's proposition. *Id.*

resistance, almost as if by a silent adverse possession.²⁸³ Be that as it may, the doctrine of police of police powers still continued to operate under the pseudonym: *res extra commercium*. This went virtually unquestioned and unopposed until the last decade when Justice Sinha began questioning the doctrine of *res extra commercium* in his dissenting judgments.

VIII. THE CONCEPTUAL AMBIGUITY

There can be discerned a great deal of conceptual ambiguity in the judgments of the Supreme Court of India dealing with the issue of *res extra commercium*; this is equally true of both species of judgment, namely, of those prohibiting certain spheres of activity by applying the doctrine as of those refusing to extend the doctrine to certain activities.²⁸⁴ Underlying this ambiguity is an imprecise characterization of the nature of the fundamental right found in Article 19(1)(g).²⁸⁵

Nowhere is the ambiguity more evident than the Supreme Court's judgment in *Khoday Distilleries v. Karnataka*²⁸⁶: a landmark judgment in which the Supreme Court sought to give a clear restatement of the Constitutional status of trade in liquor and the doctrine of *res extra commercium*.²⁸⁷ It is, however, far from being a clear restatement of the doctrine. The judgment in *Khoday* confounds what was already a confusing doctrine and rests it on a questionable characterization of Article 19(1)(g) and the reasonable restrictions under Article 19(6). The nub of the ambiguity in the judgment in *Khoday* can be stated simply. Justice Sawant holds that the power to *ex ante* regulate "traffic" in liquor, for which he retains the tag *res extra commercium*, stems from the 'police power' of the state but he struggles to accommodate such *ex ante* restriction in the scheme of the Indian Constitution.²⁸⁸ At places, he rests *ex ante* restrictions on the regulatory power under 19(6),²⁸⁹ while at the same time, at the cost of contradiction, also says

²⁸³ *Shankar*, (1975) 3 S.C.R. at [271].

²⁸⁴ *Khoday Distilleries Ltd. v. Karnataka*, 1995 SCC (1) 574 (India).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 913.

²⁸⁷ *Id.* An earlier case, *Synthetics & Chemicals v. Uttar Pradesh*, 1990 S.C.C. (1) 109 (India), clarified the constitution status of trade in non-potable liquor. However, a different set of principles have long been thought to apply to potable and non-potable liquor. Non-potable liquor has not been thought to be *res extra commercium*. *Id.*

²⁸⁸ *Khoday Distilleries*, (1995) 1 SCC 574 (India).

²⁸⁹ *Id.* at 606.

that dealing in liquor is blocked *ex ante* from falling under 19(1)(g).²⁹⁰ If dealing in liquor does not fall under Article 19(1)(g) then how could the question of regulating it under 19(6) ever arise? That is to say, if an activity is blocked *ex ante* from falling under Article 19(1)(g) then there could be no question of regulating it reasonably under Article 19(6). Conversely, if restrictions on liquor are justifiable under the reasonable restrictions imposed by law under Article 19(6) then logically it amounts to the implicit admission that dealing in liquor is not *ex ante* blocked from falling under Article 19(1)(g). Such a stance would be a most uncomfortable one as it would directly contradict the claim of *res extra commercium* constituting an *ex ante* restriction that the judgments like *R.M.D. Chamarbaugwala* so vigorously endorse in order to deny that “traffic” in liquor is business or trade falling under 19(1)(g).²⁹¹ This conceptual ambiguity stems from Justice Sawant’s imprecise characterization of the nature of fundamental right under Article 19(1)(g) and the reasonable restrictions imposed thereupon under Article 19(6).²⁹²

There is a similar ambiguity found in *Godawat*.²⁹³ The Court had to decide whether the doctrine of *res extra commercium* could be extended to trade in tobacco.²⁹⁴ In *Godawat*, the Court held that determining whether a certain activity is *res extra commercium* was the task of the legislature.²⁹⁵ It is not immediately apparent how this proposition is meant to be understood as there are two distinct ways of cashing out the idea: (1) Perhaps, the Supreme Court in *Godawat* understood *res extra commercium* not as an *ex ante* prohibition but an *ex post* one imposed by the legislature under Article 19(6) and hence the reference to the legislature; or (2) perhaps, the Supreme Court understood *res extra commercium* type restriction as *ex ante* restrictions, albeit one imposed by the legislature.²⁹⁶ It turns out that either way of understanding the Supreme Court’s judgment in *Godawat* engenders the sort of disquiet that we encountered while analyzing *Khoday*. Let us consider the first reading where *res extra commercium* is to be understood not as an *ex ante* prohibition but an *ex post* one imposed by the legislature under Article 19(6). Understood thus, the Supreme Court perhaps wanted to point out that restriction of the *res extra*

²⁹⁰ *Id.* at 608.

²⁹¹ *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, 717 (India).

²⁹² *Khoday Distilleries*, (1995) 1 SCC 574 (India).

²⁹³ *Godawat Pan Masala I.P. Ltd. v. Union of India*, (2004) 7 SCC 68 (India).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 99.

²⁹⁶ *Id.*

commercium type can only be imposed under Article 19(6) by a “law” validly enacted by a legislature.²⁹⁷ On this reading, *res extra commercium* assumes the character of a straightforward restriction on any other activity thought to be morally unobjectionable, not just the morally repugnant activities.²⁹⁸ Oddly, on this reading any “reasonable” *ex post* restriction on any business activity would have to be thought to be *res extra commercium*.²⁹⁹ To be sure, this reading of *res extra commercium* would be totally divorced from how earlier Supreme Court judgments like *R.M.D. Chamarbaugwala* understood the doctrine.³⁰⁰ To avoid this rather odd consequence, we may be tempted to gravitate towards the other reading where *res extra commercium* is seen as an *ex ante* restriction albeit one imposed by the legislature. But even this reading does little to dissipate the unease, as it comes saddled with its own riddles and problems. On this reading it would be for the “legislature” to declare some activity as *res extra commercium* and *ex ante* block it from falling under Article 19(1)(g).³⁰¹ However, such a “declaration” of *ex ante* restrictions by the legislature would be conceptually odd. If an activity is *ex ante* blocked from falling under Article 19(1)(g) the legislature’s declaration would be pointless and redundant as even without it the activity in question would not count as a trade or business under Article 19(1)(g). This reading could give rise to a seriously anomalous situation: Whereby, it is the legislature that decides whether a certain activity falls within the ambit of the fundamental right under Article 19(1)(g). This would turn on its head the very structure of fundamental rights as they are understood in the Constitution of India.³⁰² It is the Constitution that determines the scope of the legislature’s interference with people’s rights and liberties; not the other way around—where the legislature determines which constitutional right applies and on which occasions.³⁰³ Such a proposition scrambles all our common sense intuitions about constitutional rights and thus carries its incongruity branded on its forehead. Either an activity is *ex ante* restricted or not; what the legislature says on the issue is neither here nor there as far as the scope of the fundamental right is concerned. If something is *ex ante* prohibited under the Constitution, the legislature cannot make it so by its say-so; nor can it do the converse.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, 718 (India).

³⁰¹ *Godawat Pan Masala*, (2004) 7 SCC 68 (India).

³⁰² INDIA CONST. art. 19, §1, cl. g.

³⁰³ *Id.* art. 13, § 1. *Godawat Pan Masala I.P. Ltd. V. Union of India*, (2004) 7 SCC 68 (India).

IX. THE IMPERMISSIBILITY OF *EX ANTE* CONSTRICTIONS IN THE CONSTITUTION OF INDIA

Res extra commercium creates an *ex ante* regulation on fundamental rights in the interests of morality and public health, which is a function typically performed by the concept of police powers in the U.S. Constitution.³⁰⁴ It does this by constricting the fundamental rights in Article 19 of the Indian Constitution.³⁰⁵ In this Part, it will be argued that the framework of Article 19 does not permit the imposition of *ex ante* constrictions.³⁰⁶ The only regulation permissible is through reasonable restrictions imposable *ex post* by law under Article 19(6).³⁰⁷ Article 19(1)(g) guarantees to citizens the fundamental *liberty* or *freedom* to engage in any trade or business activity. The morality or otherwise of the activity does not prevent it from falling under Article 19(1)(g), though it could be a justified ground for imposition of reasonable restrictions—prohibition even—by “law” under Article 19(6).³⁰⁸ *Ex ante* constrictions on fundamental rights are not permissible for three reasons:

- (A). Constitutional liberties or freedoms guaranteed Article 19(1) are conceptually incapable of *ex ante* constrictions, and because what Article 19 guarantees are liberties/freedoms³⁰⁹, they cannot be subject to a *Mugler* type of constriction.
- (B). If *ex ante* constrictions are permissible on the grounds of health, safety, morals and the like, it would render redundant, the whole idea of reasonable restrictions, because reasonable restrictions are the only control permissible on freedoms under Article 19(1), *ex ante* constrictions are impermissible.
- (C). The concerns which led the U.S. Supreme Court to constrict the fundamental right contained in the Fifth Amendment are absent in the Constitution of India.

³⁰⁴ See *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). In what follows, this Article will be concerned only with the narrow scope reading of the police power doctrine in cases such as *Mugler v. Kansas*.

³⁰⁵ See *supra* Part V. It was argued that *Mugler* has the effect of constricting the Fifth Amendment of the U.S. Constitution. *Id.*

³⁰⁶ This Article will leave open here to question of whether this argument is extendable to Article 21. Articles 19 and 21 are very different in nature, as Article 21 does not have the equivalent of reasonable restrictions. INDIA CONST. arts. 19, 21.

³⁰⁷ The argument advanced here is valid for all fundamental freedoms in Article 19 and the reasonable restrictions in Articles 19(2) to 19(6). However, to avoid clutter this Article only refers to Article 19(1)(g) and reasonable restrictions imposable under Article 19(6).

³⁰⁸ See Datar, *supra* note 4, at 146.

³⁰⁹ In what follows, I will use the term “freedom” instead of “freedoms/liberties.”

A. *No Constrictions on Liberties or Freedoms Possible*

Though the expression, freedom, specifically appears in Article 19(1)(a) alone, other constituents of Article 19(1) are also thought to be guarantees to corresponding freedoms. In *Chintamanrao v. Madhya Pradesh*,³¹⁰ one of the earliest decisions discussing the ambit of the provision, the Supreme Court of India noted that Article 19(1)(g) guarantees the fundamental freedom to engage in any trade activity or business:

Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness unless it strikes a proper balance between the *freedom guaranteed* in Art[icle] 19(1)(g) and the social control permitted by cl[ause] (6) of Art[icle] 19, it must be held to be wanting in that quality.³¹¹

Now what is the jural nature of these freedoms? It should be noted that these freedoms are never ‘granted’ by law. They exist naturally. By this we do not seek to invoke any controversial or metaphysically ambitious natural law doctrine. The claim is much humbler and metaphysically austere. The claim here is that liberty is a legal primitive and in the absence of a duty imposed by law, there exists liberty as a default position.³¹² As Albert Kocoureck states the principle in *Jural Relations*:

The owner of a chattel has freedom to use it in any manner he sees fit so long as he does not . . . trespass on the domain of duty. . . . The law can not enlarge his liberty, since it rests on the natural capacity of the owner of the land to make such use of his land as he may . . .³¹³

Article 19(1)(g) guarantees the freedom to carry on any trade or business. Freedom is an extra legal entity; it is not granted by law.³¹⁴ It can only be curtailed by law; it is the natural capacity of agents.³¹⁵ Accordingly, Article 19(1)(g) of the Constitution does not grant freedom as it does not grant anyone the natural capacity to do anything. Article 19(1) deals with freedoms understood as natural capacities.³¹⁶ In Chief Justice Sastri’s words in *Bose*:

³¹⁰ *Chintamanrao v. Madhya Pradesh*, A.I.R. 1951 S.C. 118 (India).

³¹¹ *Id.* at 119.

³¹² See *supra* discussion in Part V.

³¹³ KOCOURECK, *supra* note 147, at 15.

³¹⁴ John Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 259 (1982).

³¹⁵ KOCOURECK, *supra* note 147, at 16.

³¹⁶ *W. Bengal v. Bose*, A.I.R. 1954 S.C. 95 (India).

[T]he framers of our Constitution drew the same distinction and classed the natural right or *capacity* . . . with other natural rights and freedoms inherent in the status of a free citizen . . . while they provided for the protection of concrete rights of property owned by a person in Art[icle] 31.

. . . .

. . . I am of opinion that under the scheme of the Constitution, all those broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the State under clause (1) of [A]rt[icle] 19, the powers of State regulation of those freedoms in public interest being defined in relation to each of those freedoms by cl[ause]s (2) to (6) of that [A]rticle.³¹⁷

Chief Justice Sastri's use of natural freedoms and capacities in typically Kocoureckian style, in the context of Article 19 is illuminating. Article 19(1)(g) guarantees that a state cannot take away freedoms enumerated in the provision.³¹⁸ While Article 19(1)(g) protects certain fundamental freedoms, it is not the "source" of these freedoms. The idea of *ex ante* restrictions on freedoms, under Article 19 is incongruous; it is antithetical to the very idea of a legal freedom. The natural capacity to do any of the things enumerated in Article 19(1) constitutes a freedom. The perceived immorality of any of those things does not cause a liberty to vanish. Thus, there can in principle be no *ex ante* restrictions on activities perceived to be immoral. Any restriction would have to be *ex post* imposed by Article 19(2)–(6) and would have to pass the test of reasonableness. The idea of *ex ante* restrictions on grounds of the perceived immorality of the activity in question is all the more incongruous. The natural capacity to do something does not diminish because of the perceived immorality of the act; it follows, the freedom to do something does not diminish because of the act's perceived immorality. The freedom guaranteed under Article 19(1)(g) cannot be controlled by morality—it can only be curtailed by a legal duty.³¹⁹

In the scheme of Article 19, these curtailments take the form of reasonable restrictions imposable by law under Article 19(6).³²⁰ Chief Justice Subba Rao

³¹⁷ *Id.* At 95–96 (emphasis added). Chief Justice Sastri's opinion makes a clear distinction between rights and freedoms and argues that Article 19 pertains to freedoms while provisions such as Article 31 pertain to rights. *Id.*

³¹⁸ *Id.*

³¹⁹ See Datar, *supra* note 4, 145–48.

³²⁰ *Id.* at 139.

in the course of his somewhat misdirected argument against what he took to be Chief Justice Das' conception of *res extra commercium* also seems to have been dimly aware of the fact that the Indian Constitution cannot permit the idea of an *ex ante* moral restriction on a legal freedom and that any such restriction must be imposed by law under Article 19(6).³²¹ That should neatly explain why Chief Justice Subba Rao opined in *Narula*:

[M]orality or otherwise of a deal does not affect the quality of the activity though it may be a ground for imposing a restriction on the said activity. . .

. . . Such an approach leads to incoherence in thought and expression. Standards of morality can offer guidance to impose restrictions but cannot limit the scope of the right.³²²

Thus, there is no scope for the imposition of *ex ante* restrictions on any of the fundamental freedoms under Article 19(1).³²³ To be sure, if some activity is thought to be immoral or pernicious to public health, the state can make a law and impose reasonable restrictions *ex post* under Article 19(6).³²⁴ But there can never in principle be an *ex ante* restriction on such an activity. If there is no reasonable law under Article 19(6) making a purportedly immoral activity illegal, a person has the freedom under Article 19(1)(g) to carry on such activity.³²⁵ It may well be an immoral activity, even one against public health: all factors crying out in favour of immediate regulation; yet, unless a law in made pursuant to Article 19(6), the activity is cannot be said to be automatically regulated *ex ante*.³²⁶ To be sure, the framers of the Constitution of India could have specifically excluded certain liberties from the Article 19(1)(g) in which case they would not be constitutional liberties any more.³²⁷ They could have added a clause saying that certain activities considered pernicious to morals would not fall under Article 19(1)(g).³²⁸ This would have introduced *ex ante* regulations on a certain class of activities; but they did not do so. Rather, they envisaged a scheme where these liberties could be

³²¹ *Narula v. Jammu & Kashmir*, A.I.R. 1967 S.C. 1368, 1373 (India).

³²² *Id.* at 1369.

³²³ INDIA CONST. art. 19.

³²⁴ *Narula*, A.I.R. 1967 S.C. at 1368.

³²⁵ India Const. art. 19, §1.

³²⁶ *Id.* art. 19, §6.

³²⁷ *Id.* art. 19.

³²⁸ *Id.*

reasonably curtailed by law made under Article 19(6).³²⁹ Such laws would impose duties that would have the effect of curtailing liberties that would have otherwise existed in their absence.

It could perhaps be contended that there is nothing problematic in freedom being controlled by morality; and hence the freedom to trade and carry on business can also be curtailed *ex ante* by morality: In *Khoday*, Justice Sawant makes just this argument.³³⁰ He argues, the freedom of trade surely cannot include “immoral activities” such as traffic in women, counterfeit currency, exhibiting pornographic films and the like as there cannot be “business in crime.”³³¹ Justice Sawant’s argument echoes H.M. Seervai’s views on the issue. Seervai argues that when traffic in women and counterfeit currency can be *curtailed* because it is immoral, so can trade in liquor and gambling.³³² Seervai, in turn adopts his argument from Chief Justice Das’ opinion in *R.M.D. Chamarbaugwala*:

On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights until they are restricted by law. Thus there will be a guaranteed right to carry on a business of hiring out goondas to commit assault or even murder, of house-breaking, of selling obscene pictures, of trafficking in women and so on until the law curbs or stops such activities. This appears to us to be completely unrealistic and incongruous.

We have no doubt that there are certain activities which can under no circumstances be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words. Learned counsel has to concede that there can be no “trade” or “business in crime” but submits that this principle should not be extended³³³

³²⁹ India Const. art. 19, §6.

³³⁰ *Khoday Distilleries Ltd v. Karnataka*, 1995 SCC (1) 574 (India).

³³¹ *See id.* at 605.

³³² *See Seervai, supra* note 1, 697–98.

³³³ *Bombay v. R.M.D. Chamarbaugwala*, A.I.R.1957 S.C. 699, 718–19 (India) (Das, C.J.); *see also Kaushal v. Union of India*, 1978 A.I.R. 1978 S.C. 1457 (India) (Iyer, J.) (“The contrary argument that all economic activities were entitled to freedom as ‘trade’ subject to reasonable restrictions which the Legislature might impose, was dealt with by the learned Chief Justice in a sharp and forceful presentation.”) .

But is this a sound argument? It is feared these examples cited by Chief Justice Das, and endorsed by Justice Sawant and Seervai, beg this question and are circular. They actually presume the very thing they are meant to establish. One can find little to quarrel with Chief Justice Das who argues there can be no business in crime. A “crime,” however, is something that is prohibited by “law” on the pain of penalty. Something perceived to be “immoral” in itself is not a crime. Each of the activities enumerated by Seervai and Justice Sawant are crimes according to laws, which are presumably constitutionally valid. Thus, it could be argued that these are instances where freedoms are “reasonably” curtailed *ex post* by “law.” None of the illustrations furnished by Chief Justice Das establish unquestionably a freedom being curtailed *ex ante* by morality. Each of these is an instance of freedom being curtailed by law—not of freedom being curtailed by morality. Immorality in itself does not constitute illegality; nor does it constrict the scope of freedoms in Article 19. For instance most of us would hold that lying is immoral but the law does not impose any general duty to speak the truth. For Chief Justice Das’ argument to have any real purchase he ought to have cited instances of activities, which are not already criminalized under constitutionally valid laws.³³⁴ Gambling and trade in liquor—all activities held by the courts to be *res extra commercium*—are the subjects of specific legislative competence entries in the Constitution of India; the criminal activities mentioned by Chief Justice Das are not.³³⁵ The concerns voiced by Chief Justice Das would only have been valid had Article 19 not had a provision authorising the imposition of reasonable restrictions.³³⁶ It could then have been argued that the only way to curtail certain obnoxious liberties would be to constrict the scope of Article 19 so as to exclude them. This, however, is not the case with the Constitution of India. Holding that immorality *constricts* the scope of freedoms in Article 19 would most certainly go against the jural design of the provision.

B. *Rendering Reasonable Restrictions Obsolete*

The idea of *ex ante* regulations is out of place in the scheme of Article 19, because if it were possible to block or regulate *ex ante* any activity on grounds of health, safety, and morals, then the reasonable restrictions clause under

³³⁴ Bombay v. R.M.D. Chamarbaugwala, A.I.R.1957 S.C. 699 (India).

³³⁵ INDIA CONST. art. 246 read with VII Schedule.

³³⁶ *Id.* art. 19.

19(6) would be rendered obsolete³³⁷ Accepting Chief Justice Das' argument, that *ex ante* constriction is permissible on Article 19 in the interests of public health, safety, and morality would mean that Article 19, as it stands, is only for activities which are not otherwise not against public health, safety, or morality. If *ex ante* constriction on Article 19 was permissible, there would have been no need for the framers to provide for reasonable restrictions to be imposable on the grounds "interest of the public" a category which incorporates grounds pertaining to public health, safety, and morality.³³⁸ The Supreme Court of India has specifically recognized public health safety and morals as falling under the rubric of reasonable restrictions imposable in the "interest of the public."³³⁹ If the police power doctrine is allowed to be imported into India, the need for reasonable restrictions will be completely obviated. Perhaps a case could have been made for *ex ante* constrictions of Article 19, if reasonable restrictions did not extend to prohibitions or to restrictions in the interests of public health, safety, and morality.³⁴⁰ In such an event, the only way to completely curtail an activity considered harmful to public health would be to deny that it falls within the scope of the constitutional protection at all by a constriction of Article 19. However, reasonable restrictions do include prohibitions.³⁴¹ Hence, the need for a separate category of *ex ante* constrictions is completely ruled out. Making an argument to this effect in *Devans Modern Breweries*, Justice Sinha points out "if by reason of judicial interpretation those trades which are obnoxious in nature would not fall within the purview of Art 19, what was the necessity of extending the meaning of 'reasonable restriction' to prohibition"³⁴²

³³⁷ *Id.*

³³⁸ *Mun. Corp. of Ahmedabad v. Usmanbhai*, A.I.R. 1986 S.C. 1205, 1212 (India).

³³⁹ *See id.* ("The expression in the interest of general public is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution.") *See also Maharashtra v. Rao*, A.I.R. 1970 S.C. 1157 (India).

³⁴⁰ INDIA CONST. art. 19. *Kumar v. Union of India*, A.I.R. 1960 S.C. 430.

³⁴¹ *See Kumar v. Union of India*, A.I.R. 1960 S.C. 430 (India) .

³⁴² *Punjab v. Devans Modern Breweries Ltd.*, 11 S.C.C. 26, 132.

C. *The Concerns That Led the U.S. Supreme Court to Constrict the Fundamental Right Contained in the Fifth Amendment Absent in the Constitution of India*

Without taking sides in the debate about the Fifth Amendment of the U.S. Constitution,³⁴³ it is easy to see why it might be thought to need something like a *Mugler*-type *ex ante* constriction in order to be effective. A *Mugler*-type restriction is premised on the assumption that the just compensation clause would only be used in cases where there is a taking of property.³⁴⁴ Hence, something that does not amount to a taking would fall outside the ambit of the takings and just compensation clause.³⁴⁵ If it was held that an interference with property was a taking, the government's obligation to pay compensation would automatically be triggered.³⁴⁶ To shield the state from vast financial liabilities for regulations in public interest, which impacted property, it was absolutely essential to constrict the applicability of the just compensation clause: *Mugler* did just that.³⁴⁷ Such considerations would, by their very nature, apply only to a provision in the nature of the takings clause. They would have no applicability to a provision in the nature of Article 19(1), which does not require compensation for any regulations that impact on any activity falling within its ambit.³⁴⁸

This is one strong reason why a *Mugler* type constriction is out of place with Article 19. In fact, when Chief Justice Das had first attempted to introduce *ex ante* constrictions through the police power doctrine, he had done so in the context of Article 31,³⁴⁹ the Indian equivalent of the takings clause in the American Constitution—by invoking *Mahon*.³⁵⁰ Chief Justice Das' brethren on the Supreme Court criticised this attempt.³⁵¹ Even if there was any justification for Chief Justice Das' attempt to do so, it was erroneous for Chief Justice Das to have extended that doctrine to a constitutional provision, which

³⁴³ U.S. CONST. amend V.

³⁴⁴ *Mugler v. Kansas*, 123 U.S. 623, 623 (1887).

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 663.

³⁴⁷ *Id.* at 664.

³⁴⁸ INDIA CONST. art. 19.

³⁴⁹ *Chowdhuri v. Union of India*, A.I.R. 1951 S.C. 41, 42 (1950) (India).

³⁵⁰ *Id.* at 63. It was argued that though Chief Justice Das ostensibly invokes *Mahon*, he seems to draw upon Justice Brandeis' dissent, which in turn supports *Mugler*. Thus it is *Mugler* that Chief Justice Das was invoking in *Chiranjitlal* though he doesn't expressly admit to doing so.

³⁵¹ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

operated very differently from the takings clause and Article 31.³⁵² Chief Justice Das's concern was that if morally repugnant and noxious activities were conceded to fall within the scope of Article 31, the government would be saddled with the enormous burden of having to compensate for interferences with such proprietary interests.³⁵³ Chief Justice Das' constriction of Article 31, by an elliptical invocation of *Mugler*, was thus really to spare the government of enormous financial burden.³⁵⁴ Neither the takings clause nor its Indian counterpart had any provision for ex post reasonable restrictions; whatever circumscriptions impossible on them had to be by way of an ex ante constriction.³⁵⁵ No such problem exists for a provision such as Article 19 which does not provides for compensation for its infringement³⁵⁶—thereby not bringing in its wake the fear of an onerous burden on the exchequer. Moreover, Article 19 unlike the takings clause and Article 31 can be circumscribed by reasonable restrictions impossible by law.³⁵⁷ There is no real justification for an *ex ante* constriction of Article 19.

CONCLUSION: LIFE WITHOUT *RES EXTRA COMMERCIIUM*

The doctrine of *res extra commercium* introduced by Chief Justice Das in *R.M.D. Chamarbaugwala* has the effect of constricting the scope of fundamental rights under Article 19(1)(g) by rendering as constitutional outcasts certain purportedly “immoral” or “noxious” activities such as sale of intoxicating liquor.³⁵⁸ It does this by blocking these activities from falling within the purview of the protection of fundamental rights.³⁵⁹ Though Chief Justice Das in *R.M.D. Chamarbaugwala* did not expressly spell it out, it was the police power doctrine, imported from the Constitutional law of the United States of America, which was the invisible hand mechanism behind the doctrine of *res extra commercium*. More precisely, it was the conception of police powers advanced by Justice Harlan of the U.S. Supreme Court in *Mugler v. Kansas*, which lies behind Chief Justice Das's invocation of *res*

³⁵² INDIA CONST. art. 19.

³⁵³ *Chowdhuri*, A.I.R. 1951 S.C. at 69.

³⁵⁴ *Id.*

³⁵⁵ U.S. CONST. amend V.

³⁵⁶ INDIA CONST. art. 19.

³⁵⁷ *Id.*

³⁵⁸ *Bombay v. R.M.D. Chamarbaugwala*, A.I.R. 1957 S.C. 699, 717–18 (India).

³⁵⁹ *Id.*

extra commercium.³⁶⁰ It has been argued here that the police power doctrine sought to be imported by Chief Justice Das under the verbal dressing of *res extra commercium* is incongruous with the scheme of the Indian Constitution and cannot perform the role assigned to it by Chief Justice Das—namely of blocking certain activities from falling within the purview of constitutional protection and rendering them constitutional outcasts.³⁶¹

The doctrine of *res extra commercium* purports to act as a constriction on the freedom under Article 19(1)(g)—and it operates in a manner clearly distinct from how the reasonable restrictions imposable by law under Article 19(6) do.³⁶² The effect of the doctrine of *res extra commercium* is that some purportedly “immoral” activities are deemed to not come within the purview of the fundamental right to carry on trade and business under Article 19(1)(g).³⁶³ Such activities are blocked *ex ante* from falling under Article 19(1)(g), thus obviating the need for the state to enact specific “law” under Article 19(6) to impose reasonable restrictions on them.³⁶⁴ On this scheme, Article 19(1)(g) stands *constricted* so as to make such activities fall completely outside its purview.³⁶⁵ However onerous or unjust the regulation on such trade or activity may thought to be, they cannot be brought up in judicial review before the courts for testing whether they infringe fundamental rights because the trade in such activity falls outside the purview of Part III of the Constitution of India. It has been argued here that such *ex ante* constrictions on Article 19(1)(g) are out of place in the scheme of the Constitution of India.³⁶⁶ The only regulation permissible is through reasonable restrictions imposable *ex post* by law under Article 19(6). Article 19(1)(g) guarantees to citizens the fundamental *liberty* or *freedom* to engage in any trade or business activity.³⁶⁷ The morality or otherwise of the activity does not prevent it from falling under Art 19(1)(g), though it could be a justifiable ground for imposition of reasonable restrictions—prohibition even—by law under Article 19(6).³⁶⁸ The court could, on a balancing of interests decide that restrictions—extending to prohibition in appropriate cases—purported to be imposed on some activity are reasonable.

³⁶⁰ See *Mugler v. Kansas*, 123 U.S. 623, 653 (1887).

³⁶¹ *Id.* at 633.

³⁶² INDIA CONST. art. 19.

³⁶³ *Id.*

³⁶⁴ INDIA CONST. art. 19, § 6.

³⁶⁵ *Id.* art. 19.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* art. 19 § 6.

However, the reasonableness of the restriction is something that is for the court to assess on the basis of well-settled principles governing the interplay of Article 19(1) and Article 19(6). The primary gripe that any student of constitutional law should have with the doctrine of *res extra commercium* is that it completely blocks the courts from undertaking any such enquiry or balancing. If the argument advanced here is to be accepted, it would be for the courts to actually undertake such balancing and determine where the balance of reasonableness lies. It is highly unlikely that the pervasive restrictions on many of activities currently countenanced because of the doctrine of *res extra commercium* would, in their existing form, pass muster under a test of reasonableness under Article 19(1)(6).³⁶⁹ Even after allowances are made to accommodate the elasticity and ambiguity inherent in the test of reasonableness, it would be hard to deny that the Indian society and its conceptions of morality have undergone a paradigm shift in the past two decades and indeed the restrictions on many of activities currently countenanced because of the doctrine of *res extra commercium* should normatively be expected to come out on the wrong side of reasonableness. The first step towards undertaking that investigation would be to liberate fundamental freedoms from the pincers of *res extra commercium*. The greatest advantage of jettisoning the doctrine of *res extra commercium* would be to deprive the state of a convenient fig leaf under which to hide many of its invasions on fundamental freedoms under Article 19. The doctrine has come to be invoked by the government in cases where the restrictions imposed on activities do not stand the least chance of passing the test of reasonableness. The best hope of the state in such cases is to block any investigation into the reasonableness of such restrictions altogether with the doctrine of *res extra commercium*.

³⁶⁹ *Id.*