ABHANDLUNGEN / ARTICLES

Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India

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Abstract: *One of the primary means of democratic subversion is constitutional amendment. In transitional democracies, it is not unusual for the constitution to include substantive constraints on the amending power as a hedge against the polity's uncertain commitment to the rule of law. Although the Indian Constitution has no such provision, its Supreme Court has taken the controversial position that the Constitution has an unalterable "basic structure". Under the basic structure doctrine, as it has become known, constitutional amendments that purport to abrogate basic norms of constitutional governance are void. In India today, the doctrine is evolving from a substantive limit on the amending power into a restriction on antidemocratic conduct, broadly understood.*

My inquiry focuses on whether the basic structure doctrine provides a coherent theory by which constitutional arbiters can address some of the pathologies that are common to postauthoritarian societies and dominant-party democracies. The article develops two lines of argument, using India as its primary case study. First, I argue in favor of expanding the conversation about judicial responses to democratic backsliding beyond constitutional amendments, to forms of democratic subversion that do not implicate the constituent power. In arguing that such an expansion is necessary, I expose various gaps in constitutional doctrine and suggest that the basic structure doctrine might operate as a normative guidepost when the law would otherwise allow partisan abuse to go unchecked. The second strand of my argument is that constitutional review in transitional settings and dominant-party democracies should be guided by a substantive canon of construction that creates an interpretive bias in favor of robust political competition, the efficacy of checks and balances, the vitality of independent institutions, the integrity of federal structures, and the nonpartisan use of public power.

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Introduction

One of the primary means of subverting democracy is constitutional amendment. In the post-war period, European states that had suffered democratic vandalism from within sought to protect their new constitutional orders from future sabotage. Their freshly minted constitutions included "unamendable" provisions, so called because they set normative baselines regarding human rights, democracy, and the rule of law from which not even legislative supermajorities could derogate, were they so inclined.[1] It is now common for the constitutions of transitional democracies to impose similar substantive constraints on the amending power as a hedge against the polity's uncertain commitment to the rule of law.[2]

India's Constitution had no such insurance policy. The country's democratic transition marked a reaction against British colonial domination rather than internal misrule. More than that, the framers understood that an overly rigid constitution could impede the social revolution on which India stood poised to embark.[3] When India's early political leaders pushed through antidemocratic changes to the Constitution in the name of that revolution, it fell to the Supreme Court to void those amendments on the theory that the Constitution had an unalterable "basic structure" – a proposition that was controversial at the time and remains so today. This article asks whether the basic structure doctrine, as it has become known, is an appropriate response to some of the pathologies that afflict postauthoritarian societies and dominant-party democracies. Such pathologies include weak political competition, ineffectual checks and balances, and the executive overreach that tends to occur in democracies that have yet to mark their first rotation in office.[4]

Already, some comparative scholars have considered the utility of basic structure-style adjudication in emergent democracies.[5] For the most part, however, these comparativists treat the doctrine solely as a remedy for odious constitutional amendments.[6] The outsized attention devoted to "unconstitutional constitutional amendments", as they are sometimes

1 The best-known example is the eternity clause in Article 79(3) of the German Basic Law, which voids any amendment that purports to derogate from the principles of human dignity, federalism and social democracy.

2 See *Yaniv Roznai*, Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea, American Journal of Comparative Law 61 (2013), p. 657.

3 *Granville Austin*, Working a Democratic Constitution: A History of the Indian Experience, New York 1999, pp. 69–98.

4 See Samuel P. Huntington/ Clement H. Moore (eds.), Authoritarian Politics in Modern Society: The Dynamics of Established One-Party Systems, New York 1971; Hermann Giliomee/ Charles Simkins (eds.), The Awkward Embrace: One-Party Domination and Democracy, Amsterdam 1999; *Sujit Choudhry*, "He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, Constitutional Court Review 1 (2009).

5 See, e.g., *Samuel Issacharoff*, Constitutional Courts and Democratic Hedging, Georgetown Law Journal 99 (2011), pp. 1000–1001; *Samuel Issacharoff*, The Democratic Risk to Democratic Transitions, Constitutional Court Review 5 (2014).

6 See, e.g., *David Landau*, Abusive Constitutionalism, University of California Davis Law Review 47 (2013); *Roznai*, note 2.

called, is understandable. Indeed, almost every effort to dismantle democracy from within features an opportunistic use of the amending power.[7] But constitutional amendment is not the only technique of democratic subversion, nor, indeed, is it the most common. All too often, the internal threat to democracy comes bedecked in the garb of constitutionally permissible legislation or executive action.

The article's central claim is that the basic structure doctrine holds untapped potential as a theory of judicial review in fledgling democracies. In India today, the doctrine is evolving from a substantive limit on the amending power into a general restriction on antidemocratic conduct. Courts have invoked the doctrine in challenges to the constitutionality of ordinary legislation and executive action. As a result, it has taken on a normative significance far exceeding the niche question of constitutional amendment to which it owes its existence.

The article proceeds in two parts. Part A lays the foundations for the argument by taxonomizing the myriad techniques of democratic subversion that do not require constitutional amendment. Part B offers a compressed history and critical analysis of the basic structure doctrine in India. I trace the development of the doctrine from its conception through to its current form, and consider what lessons it holds for judicial review of legislation and administrative action in transitional settings.

A. Techniques of Democratic Subversion: A Typology

In India, the impulse that has guided the basic structure doctrine's expansion is that many antidemocratic practices do not require constitutional amendment. Indeed, backsliding is less commonly the result of wholesale changes to the political order, of the kind that a constitutional amendment might accomplish, than of the long-game strategy of embedding authoritarianism within a framework of formal legality or "rule by law".[8] This Part identifies some political malpractices that are difficult – perhaps impossible – to test against conventional constitutional doctrines in the countries concerned. The evidence presented here suggests that constitutional amendment is neither the only nor the most common technique of authoritarian consolidation: an insight that is critical to understanding why the Indian basic structure doctrine has been, and continues to be, invoked outside the context of constitutional amendment.

7 See *Markus Kotzur*, Constitutional Amendments and Constitutional Changes in Germany, in: Xenophon I. Contiades (ed.), Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA, New York 2012, p. 129.

8 See *Robert Barros*, Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile, in: José María Maravall / Adam Przeworski (eds.), Democracy and the Rule of Law, Cambridge 2003, p. 190; *Andreas Schedler*, The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism, Oxford 2013, p. 61.

I. Capture of Independent Institutions

Agencies tasked with overseeing the political branches are typically creatures of statute. As such, their continued existence and effectiveness is within the gift of the dominant party. Recent events in South Africa underscore the magnitude of the problem. In 2011, businessman Hugh Glenister challenged the validity of legislation that disbanded South Africa's Directorate of Special Operations (DSO).[9] The DSO – known popularly as the Scorpions – was a priority crime investigation unit created by statute in 2001 and located within the National Prosecuting Authority (NPA), which itself has constitutional status.[10] As a division of the NPA, the Scorpions partook of that agency's constitutionally guaranteed independence. The DSO's independence was critical to its success, but would also prove its undoing.

The Scorpions rapidly earned a reputation as an effective anticorruption unit. They raised hackles among ANC politicians by opening corruption investigations into high-ranking party officials, among them future ANC President Jacob Zuma. Upon succeeding to the ANC presidency in 2007, Zuma spearheaded a party resolution calling for the DSO's dissolution. In defending the move, the ANC cited the Scorpions' supposedly selective enforcement of the law and politically motivated animus toward Zuma. But the ANC's motives struck many as suspicious. Not only was Zuma under the DSO's microscope at the time,[11] but a government-commissioned inquiry had previously recommended the agency's retention within the NPA.[12] In January 2009, interim President Kgalema Motlanthe signed into law two amendments that collectively abolished the DSO and created in its place the Directorate for Priority Crime Investigation (DPCI), dubbed the Hawks.[13] The Hawks were a poor substitute for the Scorpions: their integration into the police force created a line of accountability to Cabinet, and their activities were directly controlled by the Commissioner of Police, a political appointee.[14]

In proceedings before the Constitutional Court, Glenister struggled to frame the DSO's disbanding as an issue of constitutional import. His argument that the decision "undermine[d] the structural independence of the NPA" was doomed from the start because the NPA is not one of the independent institutions to which Chapter 9 of the Constitution af-

9 *Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

10 S. Afr. Const. § 179(4). The DSO was established by the National Prosecuting Authority Act 32 of 1998 § 7(1).

11 *Mail & Guardian*, DA: Scorpions Are the Last Effective Corruption Busters, 5 February 2008, http://mg.co.za/article/2008-02-05-da-scorpions-are-the-last-effective-corruptionbusters (last accessed 22 November 2014).

12 *Glenister*, note 9, paras. 6–7.

13 South African Police Service Amendment Act 57 of 2008; National Prosecuting Authority Amendment Act 56 of 2008.

14 *Glenister*, note 9, paras. 208–250.

fords heightened protection from political interference.[15] In other words, the legislation was apparently unassailable on constitutional grounds.

The Court was clearly troubled by the politically motivated shuttering of an oversight body in a country that could ill afford fewer democratic protections. At the same time, the Court recognized that Glenister's objections to the law lacked legal merit.[16] Seemingly bereft of constitutional resources with which to respond, the Court adopted an amicus's novel argument that several constitutional provisions collectively obligated the state to establish an independent anticorruption agency. The majority noted, first, that section 7(2) of the Constitution obligates the state to "respect, protect, promote and fulfill the rights in the Bill of Rights", while section 39(1)(b) directs courts to "consider international law" when interpreting the Bill of Rights.[17] Corruption, the Court observed, is a major cause of rights violations and, as such, "necessarily triggers the duties section 7(2) imposes on the state".[18] Next, the majority reasoned that section 7(2) "implicitly demands" that steps taken to implement the Bill of Rights be "reasonable".[19] An anticorruption program, it continued, could be a reasonable response only if it carried South Africa's international legal obligations into effect – including, in particular, South Africa's obligation under anticorruption treaties to establish an independent anticorruption agency.[20] For the majority, the DPCI fell short of satisfying that "domesticated" legal obligation because it was insufficiently insulated from political interference.[21] In follow-up proceedings in November 2014, the Court struck down certain amendments to the DPCI's enabling legislation that undermined its independence and made it vulnerable to political control by the ANC.[22]

The *Glenister* judgments were unquestionably a boon for democracy in South Africa. That said, the Court took liberties with constitutional doctrine that not even Glenister's counsel had anticipated. By the majority's own admission, it could not tenably be argued that the Constitution forbade the DSO's excision from the NPA. Ultimately, the Court needed to look outside the Constitution, to public international law, to check authoritarian behavior. In doing so, it all but conceded that its existing constitutional resources were not fit for purpose.

15 Ibid., para. 17 (Ngcobo J).

16 Ibid., paras. 55–82 (Ngcobo J), 162 (Moseneke DCJ & Cameron J).

17 Ibid., paras. 177, 192 (Moseneke DCJ & Cameron J).

18 Ibid., para. 200 (Moseneke DCJ & Cameron J).

19 Ibid., para. 194 (Moseneke DCJ & Cameron J).

20 Ibid.

21 Ibid., paras. 197, 208 (Moseneke DCJ & Cameron J).

22 *Helen Suzman Foundation v. President of the Republic of South Africa and Others; Glenister v. President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC).

II. Manipulation of Legislative Procedure

Political competition tends to be weaker when opposition parties have limited opportunities to prosecute their case in the legislature. Often, dominant parties will use their legislative majorities to shut down debate on bills and motions proposed by the opposition. Without meaningful opportunities to raise their profile, expose maladministration, and propose alternative policies, opposition parties can face long spells in the political wilderness.

Two recent examples from South Africa are instructive. In 2011, the ANC-dominated National Assembly promulgated a rule that barred Members of Parliament (MPs) from introducing bills unless they received "permission" from the Assembly. In effect, opposition MPs needed to obtain the permission of their political adversaries before introducing their legislative proposals. The rule gave the ANC complete control over House business and, with it, the national political agenda.[23] An opposition MP, Mario Oriani-Ambrosini, challenged the rule's validity. According to Ambrosini, the rule violated two constitutional provisions: section 55(1), which empowers the Assembly to "initiate or prepare legislation" and "consider, pass, amend or reject any legislation", and section 73(2), which entitles Cabinet members, Deputy Ministers, and Assembly members and committees to introduce Bills in the Assembly.

Ambrosini lost in the High Court, but prevailed in the Constitutional Court. The High Court held that the rule merely gave effect to the "majoritarian principle" of South Africa's democratic system.[24] But the Constitutional Court recognized that majoritarianism in South Africa is not of a piece with majoritarianism in countries that regularly undergo interparty transfers of power. Resorting to a "purposive interpretation" of section 55, the Court held that the section "should . . . be considered bearing in mind the need to breathe life into the . . . constitutional vision".[25] So construed, the power to initiate legislation was not the preserve of "the collective membership of the Assembly", but extended to individual MPs as well.[26] Each MP's prerogative to propose new laws, the Court continued, "facilitates meaningful deliberations on the significance and potential benefits of the proposed legislation" and gives practical effect to constitutional values such as multi-party democracy, responsiveness, accountability, and openness.[27] Section 55 had to be understood in the context of the former apartheid regime's efforts to "suppress dissenting views" and impose "hegemonic control over thoughts and conduct".[28]

The ANC's efforts to stifle parliamentary debate did not end there. In November 2012, the leader of the Democratic Alliance (DA), Lindiwe Mazibuko, gave notice of a motion of

23 *Oriani-Ambrosini, MP v. Maxwell Vuyisile Sisulu, MP & Speaker* 2012 (6) SA 588 (CC).

24 *Oriani-Ambrosini v. Sisulu* [2011] ZAWCHC 501, para. 94.

25 *Oriani-Ambrosini*, note 23, paras. 42–45.

26 Ibid.

27 Ibid., paras. 46, 59.

28 Ibid., para. 49.

no confidence in President Jacob Zuma.[29] The Speaker stonewalled by informing Mazibuko that the Programme Committee could not agree on the motion's scheduling. Confronted with the Speaker's intransigence, Mazibuko and other interested parties petitioned the High Court and, later, the Constitutional Court. The Constitutional Court ruled in their favor, ordering the Speaker to table the motion forthwith.[30] Again, the constitutional text did not necessarily dictate the outcome; the Court simply asserted that "[i]t would be inimical to the vital purpose of section 102(2) to accept that a motion of no confidence in the President may never reach the Assembly except with the generosity and concurrence of the majority in that Committee".[31]

Obviously, the DA's no-confidence motion was doomed to fail in the ANC-dominated legislature. But to focus on the motion's certain defeat would be to ignore the important symbolic and process value in allowing the opposition to air grievances with the ruling party. Indeed, the Constitutional Court acknowledged that the no-confidence motion is "a vital tool to advance . . . democratic hygiene".[32]

III. Erosion of Political Competition at the Subnational Level

In federal and decentralized states, the subnational government is a beachhead from which opposition parties can style themselves as credible alternatives, more effectively campaign for national office, and generally partake of an incumbent's prestige.[33] Regional government is a proving ground for opposition parties that aspire to unseat the incumbent – in India, for example, it was the burgeoning success of regional parties that finally broke Congress's hold on power in the 1977 national elections.[34]

Dominant parties intuitively understand that regional competition bodes ill for their national electoral prospects, and act to contain the threat posed by regional parties. Ruling parties can thwart regional political competition by installing loyalists in positions of power within regional governments (an "agent control" strategy) or by disempowering local political actors (an "administrative centralization" strategy).[35] Other strategies of control include holding local political actors to impossible performance standards and playing subnational governments off against one another.[36]

The center-periphery relationship is yet another context in which constitutions can actually facilitate rather than constrain partisan abuse. Article 356 of the Indian Constitution

29 *Mazibuko v. Sisulu and Another* 2013 (6) SA 249 (CC).
30 Ibid., para. 47.
31 Ibid., para. 57.
32 Ibid., para. 43.
33 *Choudhry*, note 4, pp. 27–28.
34 Ibid., p. 29.
35 *Schedler*, note 8, p. 63.
36 Ibid., pp. 66–67.

empowers the President to dissolve state governments for underperformance, instability, or abuse of authority. The power, known as "President's Rule", becomes available when the President receives word from a state governor that the state's "constitutional machinery" has broken down. Dismissal gives the center broad authority to impose its will on the subnational government. The status of state governors as central government appointees, combined with the convention that the President acts only on the advice of Cabinet, gave the government in New Delhi a potent weapon with which to check the opposition's ascendancy in the states. Governments have invoked Article 356 almost 100 times since independence, almost always to purge opposition coalitions from state office.[37] It was no coincidence that the center's resort to President's Rule increased dramatically after the 1967 elections, which saw Congress lose power in eight states.[38] The effect on political competition was devastating: three quarters of the time, President's Rule resulted in better electoral outcomes for the national party in subsequent state elections.[39] In *S.R. Bommai v. Union of India*,[40] the Supreme Court imposed strict limits on the President's power to issue proclamations under Article 356. The *Bommai* decision is discussed at length in Part B, but it warrants mention here that the Court applied the basic structure doctrine to a form of democratic subversion that did not involve constitutional amendment.

IV. Incumbency Advantages

Dominant-party rule is a function of the self-perpetuating advantages that come with incumbency.[41] Chief among those advantages is the ruling party's ability to divert public resources for partisan use. Rarely does the diversion of state resources take the form of blatant misappropriation. Instead, as in Mexico under the Institutional Revolutionary Party, ruling parties route funds to partisan causes through state-owned enterprises that are staffed by party loyalists and operate free from external oversight.[42] In Taiwan, the KMT exploited its tight control over the bureaucracy to transfer public funds to party coffers,[43] and made extensive use of "state-owned and party-owned capital for development, patronage, and

37 *K. Suryaprasad*, Article 356 of the Constitution of India: Promise and Performance, New Delhi 2001.

38 *Pradeep Chhibber*, Political Parties, Electoral Competition, Government Expenditures and Economic Reform in India, Journal of Development Studies 32 (1995), p. 78; *Paul Brass*, The Politics of India Since Independence, Cambridge 1990, p. 119.

39 *Chhibber*, note 38, p. 81.

40 A.I.R. 1994 S.C. 1918.

41 *Kenneth F. Greene*, Why Dominant Parties Lose: Mexico's Democratization in Comparative Perspective, Cambridge 2007, p. 5; *Kenneth F. Greene*, The Political Economy of Authoritarian Single-Party Dominance, Comparative Political Studies 43 (2010).

42 *Greene*, Why Dominant Parties Lose, note 41, p. 33.

43 *Chengtian Kuo*, New Financial Politics in Taiwan, Thailand, and Malaysia, National Chengchi University, Working Paper, 2000, p. 12.

regime and campaign financing".[44] Patronage is another mechanism of political control. Dominant parties dole out licenses, loans, contracts, public-sector jobs and other inducements to would-be rivals in exchange for political support.[45] Incumbents also attract the most electable candidates, who understand that affiliation with the party is the surest (and often the only) route to power. As a result, opposition parties are left to occupy the political fringes and are unable to gain a significant foothold in elections.[46]

V. Alignment Between a Ruling Party's Parliamentary and Organizational Wings

In parliamentary systems, the relationship between a party's parliamentary and extra-parliamentary wings can be a source of friction. The "potentially competing mandates or demands that parliamentarians face from their constituents and party organization" can result in the transfer of public power from democratically accountable representatives to unelected party functionaries.[47] In the South African context, ANC headquarters keeps the party's parliamentary wing in check by threatening to expel insubordinate MPs from the ANC.[48] That threat can have a particularly chastening effect because the Constitution provides that parliamentarians hold office only for so long as they remain members of the party that nominated them.[49] As a result, legislators feel pressured to act at the behest of party headquarters rather than their constituents.

VI. Manipulation of Electoral Processes

The literature on electoral design teaches that a country's electoral system can significantly influence its level of political competition.[50] Electoral systems fall into one of two broad categories. In constituency-based systems, the country is divided into various electoral districts, each of which returns a single member to the legislature. Typically, constituency-based systems produce two strong parties that command enough support to displace each other in periodic elections. In proportional representation (PR) systems, parties are awarded legislative seats in direct proportion to their overall share of the vote. Smaller parties can therefore pick up seats by aggregating their nationwide vote. But inclusion comes at the ex-

44 *Karl Fields*, KMT, Inc. Party Capitalism in a Developmental State, JPRI, Working Paper No. 47, June 1998, p. 1.

45 *Greene*, Why Dominant Parties Lose, note 41, p. 281.

46 Ibid., p. 35.

47 *Anika Gauja*, Political Parties and Elections: Legislating for Representative Democracy, Farnham 2010, p. 193.

48 *Choudhry*, note 4, pp. 70–71.

49 S. Afr. Const. §§ 47(5)(c), 106(3)(c).

50 *Susan Banducci & Jeffrey Karp*, Mobilizing Political Engagement and Participation in Diverse Societies: The Impact of Institutional Arrangements, in: Margaret Levi (ed.), Designing Democratic Government: Making Institutions Work, New York 2008, pp. 62–88.

pense of competition. The larger number of parties reduces the likelihood that any one among them can form a majority, and ideological differences make it difficult to form stable coalitions.[51]

PR systems have proven popular in transitional democracies. The received wisdom is that PR systems foster a much-needed atmosphere of political inclusion by lowering entry barriers for smaller parties and historically underrepresented groups.[52] But these systems are vulnerable to partisan abuse, as the party in power can effectively shut out the political competition by raising the vote threshold for a seat in the legislature. Research suggests that competition drops sharply once the threshold exceeds 5%.[53] In the 2002 Turkish election, for example, 46% of all votes cast were wasted because so few parties were able to cross the inordinately high threshold of 10%.[54] According to another school of thought, low thresholds can actually stymie political competition because they discourage opposition parties from joining together to form a credible alternative to the dominant party.[55]

For all the shortcomings of PR systems, constituency-based systems also create opportunities for partisan abuse. Because the formation of government requires a majority of votes in a majority of electoral districts, dominant parties will be tempted to fund pork-barrel projects in marginal seats and redraw electoral boundaries to dilute the anti-government vote. In Singapore, which uses a constituency-based model, the People's Action Party won 95% of the seats in the 1991 elections despite winning only 61% of the nationwide vote.[56]

VII. An Interim Conclusion

The foregoing discussion has identified a variety of political malpractices that do not require changes to existing constitutional frameworks, and are difficult to test against the usual public law standards of rationality, reasonableness and proportionality. These forms of democratic subversion demand deep judicial engagement with the constitution's animating values. Yet courts in transitional contexts, when pressed, have often come up short. When the wellsprings of constitutional doctrine run dry, courts struggle to find reasons to invalidate government action that passes tests of formal legality but defaults on deeper commitments to democratic governance. The remainder of this article considers the Indian

51 *Robert Dahl*, Polyarchy: Participation and Opposition, New Haven 1971, p. 120.

52 See, e.g., *Benjamin Reilly*, Trade-offs in Electoral Reform, 18 February 2011, http://www.nytimes.com/roomfordebate/2011/02/17/how-to-have-fair-elections-in-egypt/trade-offs-in-electoral-reform (last accessed 22 November 2014).

53 International Institute for Democracy and Electoral Assistance (IDEA), Electoral System Design: The New International IDEA Handbook, IDEA 2005, pp. 83–84.

54 Ibid., p. 83.

55 *Choudhry*, note 4, p. 26.

56 *Kenneth Paul Tan*, The People's Action Party and Political Liberalization in Singapore, in: Liang Fook Lye (ed.), Political Parties, Party Systems and Democratization in East Asia, Singapore 2011, p. 115.

Supreme Court's response to partisan constitutional amendments and, in particular, whether its robust approach can be transposed to facially constitutional forms of democratic backsliding.

B. The Indian Experience

I. Perspectives on the Basic Structure Doctrine

In India, the basic structure doctrine is a polarizing topic. Its detractors see the doctrine as an unprincipled conceit by which courts frustrate democratic choices that do not comport with judicial policy preferences.[57] Another line of attack is that, at least early on, courts self-indulgently used the doctrine to protect individual property rights at the expense of sorely needed economic redistribution.[58] More sympathetic commentators contend that the doctrine was once useful in shepherding India through a rocky transitional period, but is now an anachronism ill-befitting a country that proved its democratic credentials after a few false starts.[59] The doctrine's defenders rest their case largely on its track record of constraining majoritarian excess.[60]

In view of the doctrine's origins, this debate focuses largely on its role as a constraint on constitutional amendment. But a subtle shift in the doctrine's conceptualization is underway, not only in the academy but also among jurists. Sudhir Krishnaswamy's 2009 study was among the first to argue that the basic structure doctrine is now a "full-fledged doctrine of constitutional judicial review", capable of invalidating not only constitutional amendments, but also ordinary legislation and executive action.[61] Other writers have occasionally remarked upon (without always endorsing) the curious tendency of Indian courts to invoke

57 *Subhash Kashyap*, The "Doctrine" Versus the Sovereignty of the People, in: Pran Chopra (ed.), The Supreme Court Versus the Constitution: A Challenge to Federalism, New Delhi 2006, p. 105; *P.K. Tripathi*, Rule of Law, Democracy, and Frontiers of Judicial Activism, Journal of the Indian Law Institute 15 (1975), p. 33; *R.K.P Shankardass*, Anomalies of the "Doctrine", in: Pran Chopra (ed.), The Supreme Court Versus the Constitution: A Challenge to Federalism, New Delhi 2006, p. 137.

58 *Upendra Baxi*, "The Little Done, the Vast Undone": Reflection on Reading Granville Austin's The Indian Constitution, Journal of the Indian Law Institute 9 (1967), p. 323; *O. Chinnappa Reddy*, The Court and the Constitution of India: Summit and Shallows, New Delhi 2008, pp. 47–51.

59 *Raju Ramachandran*, The Supreme Court and the Basic Structure Doctrine, in: B.N. Kirpal et al. (eds.), Supreme But Not Infallible: Essays in Honour of the Supreme Court of India, New Delhi 2000, p. 117.

60 *Fali Nariman*, The "Doctrine" Versus "Majoritarianism", in: Pran Chopra (ed.), The Supreme Court Versus the Constitution: A Challenge to Federalism, New Delhi 2006, p. 89; *Virendra Kumar*, Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance, Journal of the Indian Law Institute 49 (2007), p. 397; *Pratap Bhanu Mehta*, The Inner Conflict of Constitutionalism: Judicial Review and the "Basic Structure", in: Zoya Hasan et al. (eds.), India's Living Constitution: Ideas, Practices, Controversies, London 2002, p. 203.

61 *Sudhir Krishnaswamy*, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, New Delhi 2009, p. 132. See also *Jürgen Bast*, Book Review: S. Krishnaswamy,

the doctrine outside the context of constitutional amendment.[62] This part builds upon those insights, but goes one step further by considering the generalizability of a basic-structure approach across different constitutional orders.

II. The Doctrine Emerges: 1950–1973

The origins of the Indian basic structure doctrine lay in the founding moment and the early years of self-rule. As is now well known, the Indian National Congress spearheaded the movement for independence, which culminated in the Constitution's entry into force on 26 January 1950. Congress held 69% of the seats in the Constituent Assembly and the Provisional Parliament into which it was transformed. At the first general election, Congress, under the leadership of inaugural Prime Minister Jawaharlal Nehru, retained its parliamentary supermajority by leveraging broad support for its policies of social uplift and economic redistribution. From the beginning, the party could easily muster the two-thirds majority in the Lower House (Lok Sabha) required to amend the Constitution.[63]

Atop Congress's reform agenda was the abolition of the zamindari system. In the colonial era, the British cultivated the support of pre-colonial feudal lords, known as zamindars, by granting them vast tracts of land as well as the right to collect taxes from the peasants thereon.[64] An early barrier to the redistribution of land belonging to the zamindars was the Constitution's limited guarantee of just compensation for expropriation of private property, in Article 31. Congress had always been hostile to Article 31, a provision inserted at the insistence of the party's neoliberal fringe.[65]

Congress betrayed the true depth of its commitment to property rights when India's high courts blocked its first efforts to redistribute land with minimal or no recompense to the owners.[66] In 1951, the party mobilized its parliamentary supermajority to insert Articles 31A and 31B into the Constitution. Article 31A insulated expropriation laws from judicial review for compliance with certain "Fundamental Rights" guaranteed by the Constitution, including the right to equality before the law, the freedom to practice one's profession and

Democracy and Constitutionalism in India, Verfassung und Recht in Übersee 48 (2011), pp. 273–276.

62 *S.P. Sathe*, Judicial Activism in India: Transgressing Borders and Enforcing Limits, New Delhi 2002, p. 152; *Ramachandran*, note 59, pp. 123–26.

63 India Const. Art. 368.

64 *Reddy*, note 58, pp. 5–6.

65 *Nick Robinson*, Expanding Judiciaries: India and the Rise of the Good Governance Court, Washington University Global Studies Law Review 8 (2009), p. 28.

66 See *Manoj Mate*, Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective, San Diego International Law Journal 12 (2010), pp. 179–80; *S.P. Sathe*, Supreme Court, Parliament, and the Constitution, Economic & Political Weekly 6 (1971), pp. 1822–23.

the right to property.[67] Article 31B inserted the Ninth Schedule into the Constitution and provided that whatever laws were listed therein could not be declared unconstitutional.

From the judiciary's point of view, the government had overreached. While the ostensible purpose of the reforms was to abolish the zamindari system, the Ninth Schedule could, in theory, be used to immunize *any* law from judicial review.[68] Congress defended the measures as a necessary incident of its constitutional mandate to govern in accordance with the "Directive Principles of State Policy" – a set of nonjusticiable socio-economic rights that embody India's continuing commitment to the social revolution.[69] As an avowedly socialist party, Congress viewed the Fundamental Rights as subordinate to the Directive Principles.[70] The Supreme Court's early rejection of that normative hierarchy set the stage for inter-branch conflict between Congress and the justices.

A decisive moment came in 1967, when an 11-member bench handed down judgment in *I.C. Golak Nath v. State of Punjab*.[71] The appeal marked the culmination of years-long efforts by the Golak Naths to obtain land they were due to inherit under their father's will. Acting under the 1953 Punjab Security of Land Tenures Act, the state government had expropriated most of the land.[72] The Golak Naths challenged the constitutionality of the Seventeenth Amendment, which placed the Punjab Act in the Ninth Schedule, as well as Articles 31A and 31B. They argued in the Supreme Court that "[t]he fundamental rights are a part of the basic structure of the Constitution and, therefore, the [amending] power can be exercised only to preserve rather than destroy the essence of those rights".[73] The majority of six, though sympathetic to the basic structure argument, decided the case on different grounds. Chief Justice Koka Subba Rao held that Article 368 (which provides for constitutional amendments) prescribed only the "procedure" for constitutional amendment.[74] A constitutional amendment, he reasoned, was still a "law" for constitutional purposes and, as such, could not derogate from the Fundamental Rights.[75]

Golak Nath stood for the proposition that Parliament could not use its amending power to trench on the Fundamental Rights. But the threat to democracy at issue in that case was not the dilution of the right to property. That could be justified as a legitimate redistributive measure in a country riven by inequality, and the justices so conceded. The real cause for alarm was that a single party had secured a monopoly over the process of constitutional amendment. Of particular concern was the Ninth Schedule, which raised the specter that

67 India Const. Arts. 14, 19, 31.

68 *Robinson*, note 65, p. 29; *Reddy*, note 58, p. 62.

69 *Austin*, note 3, pp. 71–72.

70 See State of Madras v. Shrimati Champaknam Dorairajan, A.I.R. 1951 S.C. 226, 228.

71 (1967) 2 S.C.R. 762.

72 *Austin*, note 3, pp. 196–97.

73 I.C. Golak Nath v. State of Punjab, (1967) 2 S.C.R. 762, 782 (Subba Rao, C.J.).

74 Ibid., 793 (Subba Rao, C.J.).

75 Ibid., 789 (Subba Rao, C.J.).

any law might be quarantined from judicial challenge at Congress's diktat. The judges were not oblivious of the threat: Several members of the Court referred obliquely to Congress's dominance,[76] and Chief Justice Rao spoke extracurially of the risk that the "brute majority" – his term for Congress bereft of Nehru's statesmanship – would ride roughshod over rights in their pursuit of socialist utopia.[77] To put such fears in context, the years of emergency rule that followed the short-lived Sino-Indian War of 1962 had brought with it the suspension of rights to equality before the law, free speech and liberty.[78] Yet, the justices' concerns betray the problem with *Golak Nath* and its predecessors. Ultimately, their retreat to the familiar terrain of rights blinded the justices to how the reality of one-party rule might inform constitutional doctrine in areas that do not lend themselves to rights analysis.

Indeed, constitutional scholars have recently argued that rights adjudication is an imperfect vehicle through which to address the pathologies that take root in dominant-party democracies. Rights-based arguments call attention to the symptom rather than the cause of abuse of power: weak political competition.[79] Absent the nontrivial prospect of losing office, incumbents are more likely to self-deal and generate arbitrary policy outputs. Samuel Issacharoff and Richard Pildes have gone so far as to argue that the risk of capture by the ruling party is inherent in democratic regimes.[80] On their account, democratic politics functions much like a market. It works best when competition among participants is robust, incenting them to respond to consumer preferences. The system becomes dysfunctional when incumbents use their dominant position to stifle competition and skew the rules of political engagement in their favor. Courts that are alarmed by creeping authoritarianism would do better to focus their efforts on the source of the problem – structural barriers to political contestation – rather than rights violations, which are epiphenomenal to the slide into autocracy.[81]

In *Golak Nath*, counsel for the petitioners did invite the Court's attention to the broader implications of one-party rule for democratic vitality. Constitutional lawyer M.K. Nambiar quoted from German legal scholar Dieter Conrad's 1965 lecture at Banaras Hindu University, in which Conrad argued that the German Basic Law's eternity clause merely made explicit what was implicit in all constitutions: the indestructibility of their core features. To illustrate his point, Conrad invited the attendees to reflect on whether a two-thirds majority could amend Article 1 "by dividing India into two States of Tamil Nadu and Hindustan proper", whether an amendment could abolish the right to life in Article 21, whether "the

76 Ibid., 816–17 (Subba Rao, C.J.), 869–70 (Hidayatullah, J., concurring).

77 *Austin*, note 3, p. 200.

78 *Imtiaz Omar*, Emergency Powers and the Courts in India and Pakistan, New York 2002, pp. 29–30.

79 *Choudhry*, note 4, p. 18; *Richard H. Pildes*, The Inherent Authoritarianism in Democratic Regimes, in: András Sajó (ed.), Out of and Into Authoritarian Law, London 2002, p. 130.

80 *Samuel Issacharoff & Richard H. Pildes*, Politics as Markets: Partisan Lockups of the Democratic Process, Stanford Law Review 50 (1998).

81 Ibid., pp. 647–48.

ruling party, if it sees its majority shrinking, [could] amend Article 368 to the effect that the amending power rests with the president acting on the advice of the prime minister", and whether the amending power could "be used to abolish the Constitution and reintroduce . . . the rule of a moghul emperor or of the Crown of England".[82] Conrad's thinking apparently struck a chord with Chief Justice Subba Rao, who acknowledged in *Golak Nath*, *obiter*, the "considerable force" in the petitioners' argument that

> *[i]f the fundamentals would be amenable to the ordinary process of amendment with a special majority . . . the institutions of the President can be abolished, the parliamentary executive can be removed, the fundamental rights can be abrogated, the concept of federalism can be obliterated and in short the sovereign democratic republic can be converted into a totalitarian system of government.*[83]

In contrast with the rights-based focus of *Golak Nath*, Conrad's hypotheticals point up the many ways that a party can abuse its dominant position to strip away democratic protections. To be sure, the dilution of rights figures in Conrad's list, but so does the bifurcation of the state, lowering the threshold for a constitutional amendment, and the introduction of autocratic rule in accordance with constitutional procedure. Each of these amendments would infringe upon individual rights in only the most abstract sense. Unlike laws that directly curtail the enjoyment of rights, these structural changes to the political order would injure no particular person or class of persons. The harms that result from Conrad's parade of horribles are better described as "expressive",[84] in the sense that they convey a troubling message about the regime's indifference or hostility to basic constitutional norms.

If *Golak Nath* reflected an inchoate understanding of how excessive majoritarianism can manifest itself, the same cannot be said of the Supreme Court's subsequent decisions. When *Golak Nath* was decided, Nehru's daughter, Indira Gandhi, had succeeded to the prime-ministership and had just led her party into the 1967 election, which brought massive losses for Congress across the country. Although the party held on to power, its two-thirds parliamentary majority was lost. In dire political straits, Gandhi held up *Golak Nath* as evidence of the Court's insouciance toward the social revolution. Her strategy succeeded: Congress regained its supermajority at the 1971 elections, together with a mandate to prevent the Court from snuffing out the socialist flame. Congress immediately moved to enact constitutional amendments that would restore Parliament's unfettered constituent power. Among the amendments was Article 31C, which shielded from judicial review, on the grounds of inconsistency with certain fundamental rights, any law that furthered the directive principles mandating that state policy ensure an equitable distribution of property. In

82 *Manoj Mate*, Priests in the Temple of Justice: The Indian Legal Complex and the Basic Structure Doctrine, in: Terence C. Halliday, Lucien Karpik, Malcolm M. Feeley (eds.), Fates of Political Liberalism in the British Post-Colony, Cambridge 2012, p. 120.

83 I.C. Golak Nath v. State of Punjab, (1967) 2 S.C.R. 762, 806.

84 *Issacharoff & Pildes*, note 80, p. 645.

addition, Article 31C provided that where Parliament had declared a law to be in furtherance of those Directive Principles, no court could review that finding.

The amendments were challenged in *Kesavananda Bharati v. State of Kerala*, the 1973 decision that inaugurated the basic structure doctrine. The case was brought by the head of a monastery in Kerala that was encumbered by laws in the Ninth Schedule, and was heard over five months by a panel of 13 judges – five of whom the government had appointed after *Golak Nath* in the expectation that they would vote to overrule that decision.[85] The Court faced an invidious choice: either affirm *Golak Nath* and wear the consequences of being seen to subordinate social progress to property rights, or cede its power of judicial review and deprive itself of an important tool for checking partisan abuse.

Ultimately, the Court charted a middle path between populism and principle. Judged on the outcome alone, *Kesavananda* was a resounding win for the government. The Court overruled *Golak Nath* and affirmed that Parliament's power of constitutional amendment enabled it to abridge the Fundamental Rights. But the devil lay in the detail. Although most of the amendments were upheld, the majority ruled Article 31C unconstitutional to the extent that it purported to abolish judicial review, which formed a part of the Constitution's unalterable basic structure.[86] The 13 judges delivered 11 opinions between them, making it difficult to identify a clear ratio. A "statement" signed by the seven majority justices and two dissentients has come to be accepted as an accurate distillation of the Court's conclusions. To oversimplify, the majority concluded that the power to "amend" in Article 368 does not entail the power to destroy or fundamentally alter the Constitution. Beyond this straightforward textualist argument, some of the judges adopted a "structural interpretation".[87] According to them, not only Article 368 but also other features of the Constitution, including its Preamble and recognition of fundamental rights, were indicative of a basic framework of government that was meant to endure. The majority judges ventured differing opinions on the elements that comprised the basic structure, though most added the caveat that their list was not exhaustive. Among the basic features identified in the majority judgments were judicial review, the supremacy of the Constitution, parliamentary democracy, federalism, secularism, separation of powers, the mandate to build a welfare state, the unity and integrity of the nation, and individual freedom and dignity.[88]

The contrast with *Golak Nath* was striking: the Court had moved beyond an exclusive focus on individual rights, by giving permanency to the political structures on which democracy depends for its vibrancy. The Court took some choices, such as the constitutional provision for judicial review, off the table, but otherwise declined to rule in or out the amendability of specific constitutional rights and political structures. A cynic might say that the Court espoused a theory of constitutional change that was only as protective of democ-

85 *Austin*, note 3, p. 271.

86 Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225, 1007.

87 *Krishnaswamy*, note 61, pp. 31–32.

88 *Austin*, note 3, pp. 265–69.

racy as the government would tolerate. Indeed, the controlling opinion upheld the bulk of the constitutional amendments at issue, including the first part of Article 31C, which removed Fundamental Rights review with respect to laws that furthered the Directive Principles.[89] As a result, Parliament could still infringe Fundamental Rights in pursuit of the Directive Principles, subject only to the Court's narrow authority to decide whether the legislation at issue truly furthered those principles.

For all this, *Kesavananda* was undoubtedly the better decision. The Court's approach restored balance to its theory of democratic protection. Paradoxically, *Golak Nath*'s response to the problem of partisan constitutional amendment was both overly restrictive and overly permissive. As Pildes explains, an exclusively rights-based approach to democratic politics not only ignores the need for structures that sustain political competition, but "can lead courts to intervene too aggressively and use rights analysis to invalidate structures that in fact provide fairer and more representative institutions".[90] So it was with *Golak Nath*: the Court safeguarded property rights, which inured mostly to the benefit of the wealthy, at the expense of policies that were designed to spread wealth more equitably among the population. *Kesavananda* was the more nuanced response to Congress's dominance. The Court's holding, although fractured, allowed future governments to continue the social revolution while limiting opportunities for abuse of the constituent power.

III. A Contested Expansion: 1975–2012

The fallout from *Kesavananda* was immediate. The day after the decision, a furious Indira Gandhi appointed A.N. Ray, one of the dissentients, Chief Justice of India. She thus superseded three other judges in the *Kesavananda* majority who preceded Ray in order of seniority, the customary determinant of the Chief Justiceship. The Prime Minister argued at the time that an "accommodating" Supreme Court was critical to the social revolution's success.[91] Granville Austin observes that there was a more calculated reason for the supersession: Raj Narain, who had run against Indira Gandhi in the 1971 elections, had recently filed an election petition claiming that the Prime Minister's victory was tainted by corruption.[92] The petition would become the catalyst for the basic structure doctrine's consolidation.

On 12 June 1975, the Allahabad High Court set aside Gandhi's election on the grounds that she had engaged in corrupt electoral practices. Gandhi's political adversaries brought immense pressure on her to resign, but she was unbowed.[93] On 25 June, the Prime Minister

89 See *N.A. Palkhivala*, Fundamental Rights Case: Comment, Supreme Court Cases Journal 4 (1973), p. 62.

90 *Pildes*, note 79, p. 131.

91 *Austin*, note 3, p. 278.

92 Ibid., p. 281.

93 Ibid., p. 295.

proclaimed an "internal emergency" under Article 352 of the Constitution, which she used as a pretext to order the arrest of thousands of political dissidents, suspend the right to move the courts for enforcement of the Fundamental Rights, and undermine press freedom.[94] In addition, Congress pushed through two constitutional amendments that were designed to tighten the Prime Minister's grip on power. The Constitution (Thirty-eighth Amendment) Act insulated emergency proclamations, presidential ordinances, and declarations of President's Rule from judicial review. The Constitution (Thirty-ninth Amendment) Act retroactively repealed the electoral laws that the Prime Minister had violated, and barred the courts from reviewing the validity of the Prime Minister's election.[95]

For good measure, the Prime Minister urged the Supreme Court to overrule *Kesavananda*. In *Indira Gandhi v. Raj Narain (The Election Case)*,[96] the Attorney General argued that the Allahabad High Court's decision was otiose because the Thirty-ninth Amendment had extinguished the legal basis for its finding against the Prime Minister. Counsel for Narain responded that the Thirty-ninth Amendment was itself void because it violated the basic structure. Thus, the correctness of *Kesavananda* was squarely before the Court. The Court unanimously upheld Gandhi's election on the basis that retrospective laws were not, of themselves, unconstitutional. However, by a four-to-one majority, the Court invoked the basic structure doctrine to invalidate the Thirty-ninth Amendment's purported removal of judicial review over the Prime Minister's election. With the sole exception of Justice Khanna, all of the justices had rejected the basic structure doctrine in *Kesavananda*. Now, desperate for a legal expedient that would rein in the worst of Gandhi's excesses, three of them would, to varying degrees, embrace a doctrine that they had so thoroughly repudiated only two years before. Chief Justice Ray and Justices Chandrachud, Mathew and Khanna held that the Thirty-ninth Amendment's abrogation of judicial review offended the basic structure, of which, according to the various judgments, the rule of law, the judicial resolution of electoral disputes and the principle of free and fair elections formed a part.[97]

Little noticed by commentators is that the *Election Case* also involved a basic-structure challenge to the Representation of the People (Amendment) Act 1974 and the Election Law (Amendment) Act 1975. These laws, together with the impugned constitutional amendments, fortified Gandhi's position as Prime Minister. Narain's counsel made the reasonable point that it would be "paradoxical" if the constituent power were subject to limits that did not apply equally to the less expansive lawmaking power.[98] Three Justices declined this invitation to extend the doctrine to ordinary legislation. Chief Justice Ray rejected as "utterly unsound" the proposition "that ordinary legislative measures are subject like Constitution

94 Ibid., pp. 309–11.

95 Ibid., p. 319.

96 A.I.R. 1975 S.C. 2299.

97 Ibid., para. 59 (Ray, C.J.), para. 213 (Khanna, J.), paras. 341–43 (Mathew, J.), para. 681 (Chandrachud, J.).

98 Ibid., para. 692 (Chandrachud, J.).

Amendments to the restrictions of not damaging or destroying the basic structure or basic features".[99] So to hold would be "to equate legislative measures with Constitution amendment" and "rob[] the legislature of acting within the framework of the Constitution".[100] Justice Mathew likewise rejected basic-structure review of legislation, remarking that "[t]he concept of a basic structure as a brooding omnipresence in the sky apart from the specific provisions of the Constitution constituting it is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law".[101] Similarly, Justice Chandrachud agreed that legislation could be challenged only for exceeding legislative power or violating the Fundamental Rights.[102]

Ironically, the only justice who thought that legislation was subject to basic-structure review was the sole dissentient, Justice Beg. Justice Beg's opinion began to develop an analytical framework and normative justification for subjecting all state action, including ordinary legislation, to basic-structure review. Said Justice Beg:

> *Courts . . . have to test the legality of laws, whether purporting to be ordinary or constitutional, by the norms laid down in the Constitution. This follows from the supremacy of the Constitution. I mention this here in answer to one of the questions set out much earlier: Does the "basic structure" of the Constitution test only the validity of a constitutional amendment or also ordinary laws? I think it does both because ordinary law-making itself cannot go beyond the range of constituent power.*[103]

Chief Justice Beg, as he later became, pursued this thread in a subsequent case, *State of Karnataka v. Union of India*,[104] in which Karnataka challenged a statute that empowered the center to call an inquiry into allegations of corruption in the states. Again, Beg located the foundations of the basic structure doctrine in the Constitution's Preamble, which set forth "the aspirations of the people of India" and "provided general guidance in judging the Constitutionality of all laws whether constitutional or ordinary".[105] Responding to his colleagues' objections in the *Election Case*, Chief Justice Beg did not read *Kesavananda* "to lay down some theory of a vague basic structure floating, like a cloud in the skies, above the surface of the Constitution and outside it".[106] Rather, on his account, the basic structure doctrine is merely an imprecise term for a process of construction by which the interpreter derives core principles from the Constitution that apply with equal force to legislation, constitutional amendments, and executive action:

99 Ibid., para. 132 (Ray, C.J.).
100 Ibid.
101 Ibid., para. 357 (Mathew, J.).
102 Ibid., para. 691 (Chandrachud, J.).
103 Ibid., para. 622 (Beg, J.) (emphasis added).
104 AI.R. 1978 S.C. 68.
105 Ibid., para. 120 (Beg, C.J.).
106 Ibid., para. 119 (Beg, C.J.).

> *[I]f, as a result of the doctrine, certain imperatives are inherent in or logically and necessarily flow from the Constitution's "basic structure", just as though they are its express mandates, they can be and have to be used to test the validity of ordinary laws just as other parts of the Constitution are so used.*[107]

There are two ways to read the basic structure doctrine as a canon of construction. On one view, which accords with Chief Justice Beg's understanding, the basic structure doctrine is a *linguistic* canon of construction. Linguistic canons refer the interpreter back to the text, providing mundane directions to construe terms in accordance with their plain meaning, in light of other provisions in the text, and on the assumption that items not expressly included are excluded, among other semantic and syntax-based presumptions. This was apparently what Chief Justice Beg had in mind when he spoke of "logical imperatives" that flow from the Constitution's Preamble and operative provisions. This lawyerly reading also explains why Chief Justice Beg seemingly rejected resort to moral or political philosophy to illuminate the basic features.[108]

But the basic structure doctrine can – and I would argue should – be understood differently, as a *substantive* canon of construction.[109] Unlike linguistic canons, substantive canons direct the interpreter to promote predetermined norms and policy choices. So expressed, the concept evokes heretical images of judges legislating from the bench. But in the common-law world – the birthplace of judge-made law – courts apply these dice-loading rules all the time. The "rule of lenity", for example, requires that ambiguities in a penal statute be interpreted in the defendant's favor, and many common-law systems apply the policy-based presumption that the legislature does not intend by its enactments to violate public international law. The basic structure doctrine is likewise a canon of substance rather than semantics: it instructs courts to interpret their constitutions with a strong thumb on the scales in favor of specific normative goals, including vibrant political competition, the nonpartisan use of public power, and the integrity of independent political institutions.

The Canadian Supreme Court endorsed a similar approach to constitutional adjudication when it spoke of a "basic constitutional architecture" in the celebrated *Quebec Secession Case*.[110] There, the Court opined that "the [rule of law] is clearly implicit in the very nature of a Constitution" – the use of the indefinite article indicating that the Court was referring to constitutions in general.[111] "The same may be said", the Court continued, of constitutionalism, democracy, and the protection of minorities.[112] The elements of this "basic constitutional architecture" are not unlike a substantive canon of construction, in that they

107 Ibid., para. 121 (Beg, C.J.).

108 Ibid.

109 *Andrew C. Spiropoulos*, Making Laws Moral: A Defense of Substantive Canons of Construction, Utah Law Review 4 (2001).

110 [1998] 2 S.C.R. 217.

111 Ibid., para. 50.

112 Ibid.

pressure the Court to make interpretive choices that present the constitutional order in its best light and to disavow others that push the Constitution away from that ideal. "The principles are not merely descriptive", the Court explained, "but are also invested with a powerful normative force, and are binding upon both courts and governments".[113] The Court was circumspect about the implications of its theory. It hastened to add that a constitution's animating principles "could not be taken as an invitation to dispense with the written text of the Constitution".[114] Yet the Court also insisted that it would, in an appropriate case, use such principles to construct "the premises of a constitutional argument that culminates in *the filling of gaps in the express terms of the constitutional text*".[115] It is in these constitutional interstices that the basic structure doctrine has real bite. Its influence is most keenly felt, and its impact greatest, when acts of democratic subversion like Indira Gandhi's power grab and those discussed in Part A would otherwise withstand constitutional challenge.

In the wake of the *Election Case*, the beleaguered Prime Minister struck one final blow against the basic structure doctrine by passing the Constitution (Forty-second Amendment) Act 1976, which purported to remove all limits on the constituent power. Gandhi called an election soon afterward, seeking a mandate to put the Court in its place. But she miscalculated the electoral backlash against her emergency measures. After 27 years of unbroken rule, Congress's time in office came to an abrupt end. Later, in *Minerva Mills v. Union of India*,[116] the Supreme Court held that the basic structure doctrine was itself a part of the Constitution's basic structure, and hence irremovable by constitutional amendment.

Until this point, the basic structure doctrine was predominantly regarded as a limit on constitutional amendment, and no more. The next major decision on the basic structure doctrine, in 1994, would dramatically expand its domain. In *Bommai*, the Court reviewed the center's dismissal of state governments in the states of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Rajasthan and Himachal Pradesh. *Bommai* brought together two of the most sensitive issues in Indian politics and constitutional law: the role of state governments relative to the center, and the tension between secularism and religion in Indian public life.

The practice of central governments dismissing their state counterparts had long been a contentious issue in Indian politics.[117] The dismissals at issue in *Bommai* were especially controversial because the avowedly secular Congress party had advised the dismissal of Hindu nationalist governments in several states. In December 1992, Congress was moved to act when Hindu nationalists, backed by the Hindu-aligned Bharatiya Janata Party (BJP) government in Uttar Pradesh, set off nationwide riots by demolishing the Babri Masjid mosque in Ayodhya. The mosque, which allegedly stood on land once occupied by Hindu temples, had long been a focal point of ethno-religious tensions. Although Uttar Pradesh's

113 Ibid., para. 54.
114 Ibid., para. 53.
115 Ibid. (emphasis added).
116 A.I.R. 1980 S.C. 1789.
117 See text accompanying notes 37–40.

Chief Minister resigned over the incident, Congress proceeded to dismiss BJP governments in Madhya Pradesh, Rajasthan and Himachal Pradesh. The removal of these governments followed dismissals of three other governments in Karnataka, Meghalaya and Nagaland. The Supreme Court considered the challenges brought by the ousted governments in one consolidated case.

Before *Bommai*, the Court had held that the discretion entrusted to the President by Article 356 was essentially political in nature and could be reviewed only on a showing of bad faith – a common-law ground of review on which it is virtually impossible to prevail.[118] The provision's language supported that reading, cast as it was in terms of a subjective discretion. By the time of *Bommai*, however, the Court could not deny that "Article 356 [had] a potentiality to unsettle and subvert the entire constitutional scheme".[119] The majority justices concluded that the basic structure doctrine had legal force outside the context of constitutional amendment. In their view, the basic features of the Constitution – now expanded to include federalism, social pluralism, and secularism – defined and delimited the scope of the President's discretion under Article 356. By this logic, the President not only may but *must* dismiss a state government that is acting in disregard of the Constitution's basic structure, of which the principle of secularism forms a part. Thus, the President's dismissal of BJP governments in Madhya Pradesh, Rajasthan and Himachal Pradesh was upheld because these governments had committed themselves in word and deed to the Babri Masjid's destruction, exposing their determination "to subvert or sabotage secularism as enshrined in our Constitution".[120] Conversely, a dismissal would be unconstitutional if the act of dismissal would itself offend the basic structure – for example by undermining the principle of federalism. In this regard, one justice noted "the temptation of the political party or parties in power . . . to destabilise or sack the Government in the State not run by the same political party or parties".[121] Henceforward, proclamations issued under Article 356 would be "closely and circumspectly" scrutinized for signs of a motive inconsistent with the dictates of the basic structure doctrine.[122] Applying this strict standard, the majority held that there was insufficient evidence to conclude that the President's dismissal of governments in Karnataka, Meghalaya and Nagaland was in keeping with the basic structure.[123]

In essence, the *Bommai* Court eschewed a textualist approach to Article 356 in favor of a reading that shielded subnational governments from undue interference by the center, while still exposing them to dismissal for partisan abuses of their own. The Court found the normative resources for distinguishing between legitimate and illegitimate uses of Article 356 in the basic structure doctrine, now interpreted to bring within its sweep both secular-

118 S.R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918.
119 Ibid., para. 96 (Sawant, J.).
120 Ibid., para. 152 (Sawant, J.).
121 Ibid., para. 104 (Sawant, J.).
122 Ibid., para. 96 (Sawant, J.).
123 Ibid., para. 434 (Jeevan Reddy, J.).

ism and federalism. The doctrine functioned as a kind of normative lodestar, guiding the Court toward a reading of Article 356 that promoted democratic contestation in the states and restrained partisan abuse of President's Rule.

Careful readers of *Bommai* have expressed unease with the application of the basic structure doctrine in a case that had nothing to do with constitutional amendment.[124] Even Sathe, who praises the Court for "giving a warning to the Hindu Right", acknowledges that the Court's resort to the basic structure doctrine was inessential to its holding.[125] The implication is that the Court invoked the doctrine tendentiously, as legal window dressing for an intervention into matters of high politics. Yet few commentators familiar with India's history of ethno-religious conflict would doubt that the Court's action has curbed abuses of power by the center and consolidated pluralist democracy in an inhospitable environment. "One may criticize the Court for acting politically in *Bommai*", Sathe writes, "but one cannot deny that the Court's politics has helped the politics of governance become more principled and democratic."[126] At the same time, the Court's endorsement of the venerable Indian tradition of *sarva dharma sambhava* (equal respect for religious faiths) sounded a stern warning to the forces of religious extremism.[127] If constitutional arbiters cannot help but temper their decisions with politics, they could do much worse than the Indian Supreme Court in *Bommai*.

The expanded form of basic structure review has surfaced in subsequent decisions. In *Ismail Faruqui v. Union of India*,[128] a 1994 sequel to *Bommai*, a five-member bench invoked the basic structure doctrine to invalidate a provision of the Ayodhya (Acquisition of Certain Areas) Act 1993. The provision extinguished all pending suits and legal proceedings arising from the Babri Masjid's destruction, and provided no alternative form of redress for aggrieved Muslims. The majority held that the impugned provision "negated" the rule of law, an element of the basic structure, by denying a judicial remedy to litigants in the pending suits.[129] The minority likewise held that the abatement provision violated the basic structure, but on the different ground that it offended the principle of secularism by "being slanted in favour of one religious community as against another".[130] The next year, in *G.C. Kanungo v. State of Orissa*,[131] the Court invoked basic-structure review to invalidate a state statute that nullified arbitral awards.

124 *Ashok Desai*, Constitutional Amendments and the "Basic Structure Doctrine", in: Venkat Iyer (ed.), Democracy, Human Rights, and the Rule of Law: Essays in Honour of Nani Palkhivala, New Delhi 2000, p. 90.

125 *Sathe*, note 62, p. 98.

126 Ibid., p. 158.

127 *Gary Jacobsohn*, Constitutional Identity, Cambridge Mass. 2010, pp. 177–78.

128 A.I.R 1995 S.C. 605.

129 Ibid., 637, 644 (Verma, J.).

130 Ibid., 654 (Bharucha, J.).

131 A.I.R. 1955 S.C. 1655.

The basic structure doctrine's slow expansion has been fitful. In the 2006 decision in *Kuldip Nayar v. Union of India*,[132] a five-judge bench renounced the basic structure doctrine as a source of implied limits on ordinary legislation. The petitioner in *Nayar* challenged two amendments to the Representation of People Act 1951. One amendment dispensed with a state residency requirement for members of the Rajya Sabha (Upper House). The other required an open ballot for that chamber's election of the President. The purpose of this amendment was to abolish "cross voting" – the practice of legislators accepting inducements to vote for a particular presidential candidate. The petitioner argued that the legislation offended the basic structural principle of federalism because the Rajya Sabha would be less representative of the states without a domicile requirement, and the open-ballot requirement would have a chilling effect on legislators when they cast their votes. Chief Justice Sabharwal, speaking for the majority, upheld the amendments and declared that "the doctrine of 'Basic Feature' [sic] in the context of our Constitution, . . . does not apply to ordinary legislation".[133]

Yet it would be a mistake to think that *Nayar* was the final word on whether the basic structure doctrine has any purchase outside the rarified context of constitutional amendment. In 2012, a two-member panel considered a challenge to India's Fast Track Courts, which were established to dispose of long-pending matters in the lower courts.[134] The panel mentioned in passing that "[a]ny *policy or decision* of the government which would undermine or destroy the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution".[135] In addition, the Court remarked that "[i]f [a] sufficient number of Judges are not appointed, justice would not be available to the people, thereby undermining the basic structure" – suggesting that government *inaction* might also raise basic structure concerns.[136] Evidently, the view of the basic structure doctrine as a substantive canon of construction, traceable to *Bommai* and its progeny, continues to resonate with certain members of the Court. Whether the Court will endorse or repudiate the doctrine's expansion in a future case remains to be seen.[137]

Conclusion

"[T]his much I think I do know – that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes no Court need save; that a society which evades its responsibility by thrusting upon the Courts the nurture of that spir-

132 (2006) 7 S.C.C. 1.

133 Ibid., 67 (Sabharwal, C.J.).

134 Brij Mohan Lal v. Union of India, [2012] 5 S.C.R. 305.

135 Ibid., para. 76 (Swatanter Kumar, J.) (emphasis added).

136 Ibid., para. 25 (Swatanter Kumar, J.).

137 Constitutional amendments, once common in India, have become far less so with the rise of minority governments beginning in 1989. *Sathe*, note 62, p. 98. It is too early to tell whether the election of a majority BJP government in 2014 marks the start of a new trend in Indian politics.

it, that spirit will in the end perish".[138] So said the American jurist Learned Hand. It has become fashionable to invoke Hand's statement to justify a kind of constitutional quietism. His remark points up the folly in believing that Herculean judges can bring authoritarians to heel with clarion judgments that affirm liberal-democratic values.

And yet, for all this, the Indian experience shows that an apex court with a realistic conception of its role can force democratic course correction at critical junctures. In the *Election Case*, the Court's defiant push against majoritarian excess served as a much-needed circuit breaker at a time when the prospects for democracy in India looked grim. And in *Bommai*, the Court opened up a space for regional political competition by identifying constitutional limits on the much-abused power to dismiss state governments. The Indian experience teaches that we can accept that constitutional arbiters are not a panacea for partisan abuse while still believing, with good cause, that they can alter the political equilibrium in small but important ways.[139]

My goals in this article have been twofold. First, I have sought to expand the conversation about judicial responses to democratic backsliding beyond constitutional amendments, to forms of democratic subversion that do not implicate the constituent power. At the outset, I exposed various gaps in constitutional doctrine and suggested that the basic structure doctrine might operate as a normative guidepost when the law would otherwise allow partisan abuse to go unchecked. I then discussed how the basic structure doctrine has been cautiously and controversially invoked to combat democratic subversion in India when it has surfaced outside the context of constitutional amendment.

The second strand of my argument has been that constitutional review in transitional settings and dominant-party states should be guided by a substantive canon of construction that creates an interpretive bias in favor of robust political competition, the efficacy of checks and balances, the vitality of independent institutions, and the nonpartisan use of public power. Text is undisputedly the interpretive aid of first resort, but its primary purpose in matters constitutional is to concretize a polity's unwritten commitment to democratic governance and certain pre-constitutional values. The basic structure doctrine was born of the basic truth that all constitutions have a normative valence that cannot be distilled into words, but must await reasoned judicial exposition on a case-by-case basis.

138 *Learned Hand*, The Contribution of an Independent Judiciary to Civilization, in: Irving Dilard (ed.), The Spirit of Liberty: Papers and Addresses of Learned Hand, New York 1960.

139 *Issacharoff*, Democratic Hedging, note 5, p. 1011.